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MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-3881

THE BOARD OF SUPERVISORS
OF FAIRFAX COUNTY, VIRGINIA,
Petitioner,

v.

ROY G. ALLMAN, *Trustee, et al.,*
Respondent.

THE BOARD OF SUPERVISORS
OF FAIRFAX COUNTY, VIRGINIA,
Petitioner,

v.

THOMAS R. WILLIAMS, *et al.,*
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

To: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The Board of Supervisors of Fairfax County, Virginia, the petitioner herein prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia in the above-entitled *Allman* case dated

January 20, 1975 with rehearing denied and decree entered on June 13, 1975, and in the above-entitled *Williams* case entered on June 13, 1975. Because the cases involve identical or closely related questions, a single petition covers the cases pursuant to Rule 23(5) of the Rules of the Supreme Court of the United States.

OPINIONS BELOW

The opinions of the Supreme Court of Virginia are reported as follows: *Board of Supervisors of Fairfax County* v. *Allman*, 215 Va. 434, 211 S.E.2d 48 (1975) and *Board of Supervisors of Fairfax County* v. *Williams*, ——— Va. ———, 216 S.E.2d 33 (1975). These opinions are printed in the *Appendix*,[1] *infra*, at pages 1 and 17, respectively.

The order denying the petition for rehearing in the *Allman* case is printed in the *Appendix, infra*, at page 16.

JURISDICTION

The decision of the Supreme Court of Virginia in *Allman* was dated January 20, 1975. A timely notice and petition for rehearing were filed and pursuant to Rule 5:53(a) of the Rules of the Supreme Court of Virginia the clerk of that court withheld certification of the mandate of the opinion until the petition for rehearing was disposed of. The petition for rehearing was denied on June 13, 1975.[2]

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[1] "*Appendix*" here is italicized to differentiate from "Appendix." The former refers to the printed appendix made part of this petition; the latter refers to appendices of record before the Supreme Court of Virginia.

[2] *See Citizens' Bank of Michigan City* v. *Opperman*, 249 U.S. 448 (1919) (timeliness—petition for rehearing tolls running of filing period).

The decision of the Supreme Court of Virginia in *Williams* was also entered on June 13, 1975.

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257 (3):

> By writ of certiorari, . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution . . . .

The meaning that this Court has given to the word "statute" in 28 U.S.C. § 1257(1) and (2) does not differ from the meaning that should be accorded the word "statute" in 28 U.S.C. § 1257(3):

> Since the sta[t]utory references to drawing the validity of treaties and statutes into question are identical with respect to certiorari and to appeals, the same tests are applicable in determining when a "treaty" or a "statute" is involved and whether the "validity" thereof has been determined . . . . The only difference is that for purposes of certiorari it is immaterial whether the state court finds the pertinent law valid or invalid, whereas an appeal may be taken only if the question is decided in a particular way. Stern and Gressman, *Supreme Court Practice,* pp. 87-88 (4th ed. 1969).

The decision not to grant the rezoning classifications at issue in this proceeding are identical to other decisions of a legislative character which this Court has interpreted as "statutes" for purposes of 28 U.S.C. § 1257:

> We think that the order is a "statute" for the purposes of § 1257(2). Under that section, the legislative character of challenged state action, rather than the nature of the agency of the State performing the act, is decisive of the question of jurisdiction. It is not necessary that the state legislature itself should have taken the action

drawn in question. In construing the similar jurisdictional provision in the Judiciary Act of 1867, 14 Stat. 385, we said: "Any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court." *Williams* v. *Bruffy*, 96 U.S. 176, 183, 24 L.Ed. 716, 717. We likewise said of the provision of the Act of 1925, 43 Stat. 936, which is the present § 1257(2): ". . . the jurisdictional provision uses the words 'a statute of any State' in their larger sense and is not intended to make a distinction between acts of a state legislature and other exertions of the State's lawmaking power, but rather to include every act legislative in character to which the State gives its sanction." *King Mfg. Co.* v. *City Council of Augusta*, 277 U.S. 100, 104, 105, 72 L.Ed. 801, 805, 806, 48 S.Ct. 489. Thus this Court has upheld jurisdiction on appeal of challenges to municipal ordinances, *e.g.*, *King Mfg. Co.* v. *City Council of Augusta*, (U.S.) *supra*; *Jamison* v. *Texas*, 318 U.S. 413, 87 L.Ed. 869, 63 S.Ct. 669, certain types of orders of state regulatory commissions, *e.g.*, *Lake Erie & W. R. Co.* v. *State Public Utilities Com.*, 249 U.S. 422, 63 L.Ed. 684, 39 S.Ct. 345; and some orders of other state agencies, *e.g.*, *Hamilton* v. *Regents of University*, 293 U.S. 245, 257, 258, 79 L.Ed. 343, 349, 350, 55 S.Ct. 197. It is true that in these cases the state agency the action of which was called in question was exercising authority delegated to it by the legislature. However, this fact was not determinative, but was merely relevant to the character of the State's action. The absence of such a delegation does not preclude consideration of the exercise of authority as a statute. *Lathrop* v. *Donohue*, 367 U.S. 820, 824-25 (1961).

QUESTION PRESENTED FOR REVIEW

Did the Supreme Court of Virginia, By a Misinterpretation of the Equal Protection and Due Process Clauses, Misapply the Fourteenth Amendment to the United States Constitution and Thereby Invalidate a Legitimate Exercise of the Police Power of the State?

STATUTES INVOLVED

Section 30-2.2.2. (RE-1; one family residential, 1 acre district) of the *County of Fairfax Zoning Ordinance* is set forth in the *Appendix, infra,* at page 83. However, it was not the general constitutionality of the RE-1 ordinance which was declared to be a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

[Citizenship Rights Not to Be Abridged by States]

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The case also involves certain planning and zoning enabling legislation. *See* generally, *Va. Code Ann.* § 15.1-427 *et seq.*, pertinent portions of which are set forth in the *Appendix, infra,* p. 84. Of particular importance is *Va. Code Ann.* § 15.1-486, the introductory paragraph of which delegates the police power function of zoning from the state legislature to the local legislature. *Appendix, infra,* p. 88.

STATEMENT OF THE CASE

Fairfax County, Virginia is an urban County located in the Washington, D.C. metropolitan area. It is also the most populous jurisdiction in the Commonwealth of Virginia. In the fifteen-year period from 1957 to 1972 the County's population increased by approximately 150 percent, growing from 207,000 persons in 1957 to 502,856 persons in 1972. This population explosion created a chaotic situation in the County, and placed monumental strains on the public facilities and other resources of the County.[3]

Faced with problems attendant to the population explosion, it became apparent to the Board of Supervisors of Fairfax County, the local governing body, that its zoning and planning decisions would have to take into account the availability of public facilities.[4]

These cases involve the applications of private landowners to a local governing body for an amendment to the zoning ordinance as it affected their respective

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[3] *Allman*, Appendix II, pp. 142-49, Appendix III, p. 74.

[4] One commentator, discussing Fairfax County specifically, has noted:

> As in many other "bedroom communities near major cities, citizens in Virginia's Fairfax County realized a few years ago that uncontrolled growth was heading their county toward a crisis. In this 400-square-mile area a half-hour from downtown Washington, schools were jammed, sewage treatment were overloaded, and traffic clogged the roads. The county had grown from 22,000 in 1920 to 98,000 in 1950 and 453,000 in 1970. It was run by a board of supervisors whose majority still believed in growth at all costs. Taxes were skyrocketed as costs of additional schools and county-provided services exceeded revenue from new residents. R. Cahn, "Where Do We go From Here," contained in R. W. Scott, *Management and Control of Growth*, p. 61, 79 (1975).

properties.[5] In each case the local governing body declined to amend the zoning ordinance for various zoning and planning reasons including the inadequacy of public facilities at that time to support the higher density residential developments requested.

In each case the landowners filed suit in the Circuit Court of Fairfax County, charging among other things a denial of due process and equal protection as guaranteed by the United States Constitution (*Allman,* Appendix I, p. 5; *Williams,* Appendix I, pp. 4, 16, 23).

In *Allman* the trial court ruled that other properties had been placed in more intense, and thus more profitable, zoning districts and that the reaffirmation of the existing zoning therefore constituted unlawful discrimination. (*Allman,* Appendix I, p. 11). In *Williams* the trial court also ruled that other properties had received higher intensity zoning and that therefore the retention of existing zoning was unlawful. (*Williams,* Appendix I, p. 28).

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[5] *Board of Supervisors of Fairfax County, Virginia* v. *Allman, supra,* involved a tract of land for which Roy G. Allman, Trustee, was the lead rezoning applicant, plaintiff at trial, and appellee in the Supreme Court of Virginia. For the sake of clarity, "*Allman,*" as hereinafter used, refers to the opinion of the Supreme Court of Virginia, "Mr. Allman" refers to the property owners in their individual capacities, and "the Allman property," or similar language, refers to the parcel as a tract of land.

Board of Supervisors of Fairfax County, Virginia v. *Williams, supra,* involved two similar rezoning cases, consolidated for judicial review at both the trial and appellate levels. No substantial factual difference exists between the two adjoining parcels involved, in character, cost, or location. "*Williams,*" as hereinafter used, refers to the opinion of the Supreme Court of Virginia, "Mr. Williams" refers to the property owners in their individual capacities, and "the Williams Property," or similar language, refers to the two adjoining parcels as tracts of land.

The Board petitioned and was granted an appeal in each case by the Supreme Court of Virginia. The Board contended that there was no violation of due process or equal protection. (*Allman*, Brief of Appellant, pp. 15-30, Petition for Rehearing, pp. 5-6; *Williams*, Brief of Appellant, pp. 14-33). The Briefs of Appellees in both *Allman* and *Williams* charged violations of Articles V and XIV (sic, Amendments V and XIV) of the United States Constitution (*Allman*, Brief of Appellees, p. 44; *Williams*, Brief of Appellees, p. 40), and clearly presented the relevant federal issues to the Supreme Court of Virginia.

In *Allman* the subject property was zoned RE-1 which allowed 273 single family homes on the 300-acre tract. Mr. Allman requested zoning which would have permitted 988 units. The comprehensive plan for the area proposed the subject property for future development consistent with the density figures of the Allman proposal but had no time frame for implementation.[6]

The Supreme Court of Virginia primarily concerned itself with discrimination, *i.e.*, a violation of equal protection.[7]

Other properties in the general area had received higher density zoning and had, therefore, received an economic benefit by virtue of legislative action.

The Board of Supervisors' position was that public facilities inadequacies forced the local government to

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[6] Under *Va. Code Ann.* § 15.1-446 the plan shows the planning "commission's long-range recommendations for the general development of the territory covered by the plan." Section 446 is set out in full at *Appendix, infra*, p. 86.

[7] His [*Allman's*] evidence established a course of action by the Board that was inconsistent and discriminatory. *Allman*, 211 S.E.2d at 55 (Va. 1975).

discriminate rationally in rezonings. The Supreme Court of Virginia recognized that there was evidence on both sides of the public facilities adequacy question, but upheld the trial court nonetheless, finding the legislative decision to be constitutionally impermissible.

In 1970 and 1971, the landowners involved in *Williams* applied for rezoning in neighborhoods of the Middle Run watershed of the County contrary to the sequential policy of the applicable comprehensive plan, which provided for urban density development after 1975. These requests were denied in late 1972. The trial was held in July of 1973.

The Supreme Court of Virginia held, *inter alia,* that the actions taken under the timing aspects of the comprehensive plan violated the Equal Protection Clause,[8] upholding the trial court's finding of unconstitutionality.

After determining the legislative actions of the Board of Supervisors to be unconstitutional, the Supreme Court of Virginia remanded the cases to the trial courts for action which would strip the Board of its future legislative discretion.

REASONS FOR ALLOWANCE OF WRIT

INTRODUCTION

Zoning is an act by which government regulates the private use of land for the public good. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). The act of zoning is either legislative or quasi-judicial. *Compare Euclid* v. *Ambler Realty Co., supra,* with *Fasano* v.

[8] "The effect of the application of the Board's Middle Run policies was to discriminate between similarly-situated property." *Williams,* 216 S.E.2d at 41.

Board of County Commissioners of Washington County, 507 P.2d 23 (Ore. 1973). Virginia follows the majority rule that zoning is a legislative act. *Board of Supervisors of Fairfax County* v. *Allman*, 211 S.E.2d 48 (Va. 1975); *Blankenship* v. *City of Richmond*, 49 S.E.2d 321 (Va. 1948); *West Bros. Brick Co.* v. *City of Alexandria*, 192 S.E. 881 (Va. 1937); *Va. Code Ann.* § 15.1-427 *et seq.*, *Appendix, infra*, p. 84.

In misapplying the constitutional interpretations of this Court, the Supreme Court of Virginia invalidly restricted the police power of the State which has been delegated to Fairfax County by the Virginia General Assembly in the field of zoning. *See Blankenship* v. *City of Richmond*, 49 S.E.2d 321, 325 (Va. 1948) (zoning power delegated to locality); *see also Va. Code Ann.* §§ 15.1-427 *et seq.*; *Euclid* v. *Ambler Realty Co.*, 272 U.S. at 387 (zoning ordinances find their justification in the police power).

This Court has so insisted on deference to the state police power that it has rarely granted review to cases arising in the land use field since *Euclid*. The essence of the *Euclid* doctrine with respect to the relationship between zoning and planning and federal constitutional law is found in the following language:

> . . . before the ordinance can be declared unconstitutional, (it must be said) that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. *Euclid* v. *Ambler Realty Co.*, 272 U.S. at 395.

In *Euclid*, therefore, this Court spoke of the right of a municipality to "govern itself as it sees fit within limits of the organic law of its creation and the State

and Federal Constitutions." By misconstruing the Fourteenth Amendment, the Supreme Court of Virginia has made it impossible for the Fairfax County Board of Supervisors, "representing a majority of its inhabitants and voicing their will" to exercise its police power under the State and Federal Constitutions. *Id.*, at 389.

I. DID THE SUPREME COURT OF VIRGINIA MISAPPLY THE FEDERAL CONSTITUTIONAL REQUIREMENT OF EQUAL PROTECTION?

A. The Supreme Court Of Virginia Relied On The Equal Protection Clause Of The Fourteenth Amendment.

The Supreme Court of Virginia often uses the term "discrimination" interchangeably with a specific reference to a violation of equal protection. This becomes clear in the dissent in *Williams* and in a zoning case decided by that court on June 13, 1975, the same day it decided *Williams* and denied rehearing in *Allman*. The following quotes from the three zoning cases show the court's reliance:

In *Allman*:

> . . . Allman, although entitled to equal treatment in the consideration of his application, had been subjected to discrimination, had not been accorded the same treatment as other applicants for rezoning . . . *Allman*, 211 S.E.2d at 52.
>
> * * *
>
> Allman has overcome the presumption of legislative validity that attached to the action of the Board in reaffirming a RE-1 classification for his land. His evidence established a course of action that was inconsistent and discriminatory. *Id.* at 55.

In *Williams*:

> In the trial court, the inquiry focused upon two issues: (1) [public facilities] and (2) whether the Board's denial of the rezoning requests was discriminatory. *Williams*, 216 S.E.2d at 35.
>
> * * *
>
> Thus, the trial court found . . . it was discriminatory and therefore arbitrary and capricious to deny higher-density zoning to the land in question. *Id.* at 36.
>
> * * *
>
> The effect of the application of the Board's Middle Run Policies was to discriminate between similarly-situated property . . . . This is the same type discriminatory practice described as arbitrary and capricious and therefore condemned in *Board of Supervisors of Fairfax County* v. *Allman* . . . . *Id.* at 41.

Equal protection was specifically acknowledged in the *Williams* dissent of Justice Cochran:

> The applicants contend that the Board breached its own comprehensive plan by denying the requested rezoning and approving higher-density rezoning for other applicants similarly situated. The Board correctly maintains that the comprehensive plan is not a zoning ordinance but is merely a guideline. *Fairfax County* v. *Snell Corp., supra*, 214 Va. at 660, 292 S.E.2d at 894 (1974). However, adherence to or departure from the Plan may be considered in determining whether the Board has acted reasonably in fixing zoning classifications and in acting on the rezoning applications of the applicants and others similarly situated, or *whether it has denied the applicants their constitutional right to equal protection.* *Williams*, 216 S.E.2d at 46 (dissenting opinion) (Emphasis added.)
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> * * *

> Mere inequality of treatment among neighboring landowners is not of itself unconstitutional. Any zoning ordinance may involve unequal treatment, but such unequal treatment is proscribed only when it is invidious, or "arbitrary and capricious." In *Allman*, we affirmed the rule that unequal treatment of similarly situated landowners is "arbitrary and capricious" when it lacks a rational basis and bears no substantial relation to the public health, safety, morals, or general welfare . . . . The classifications established here by the Board were based on a rational plan for orderly development of a subwatershed. *Id.* at 47.

In *Board of Supervisors of James City County* v. *Rowe*, 216 S.E.2d 199 (Va. 1975), a zoning case decided contemporaneously with *Williams* but written by a different Justice than *Allman* or *Williams*, the court stated:

> We consider . . . whether the B-2 zoning of the subject property to the exclusion of other areas is a discriminatory classification in violation of the equal protection guarantee . . . . *Id* at 205.
>
> * * *
>
> Adjacency is always relevant to the question of discriminatory zoning classification, but adjacent properties may be zoned differently when there is a rational basis for the different classifications. [Citations omitted] . . . Zoning classifications of adjoining areas enjoy the presumption of legislative validity and equal protection until the presumption is overcome by evidence of discrimination. *Id.* at 206.
>
> * * *
>
> When a land use permitted to one landowner is restricted to another similarly situated, the restriction is discriminatory, and, if not substantially related to the public health, safety, or welfare, constitutes a denial of equal protection of the laws. *Id.* at 210.

It is clear from the dissent in *Williams* and the analysis in *Rowe* that the Supreme Court of Virginia equates "invalid discrimination" with a "violation of equal protection." The Constitution of Virginia has no equal protection clause.[9] The pleadings of *Allman* and *Williams* charged violations of the Fourteenth Amendment to the United States Constitution.[10] In addition, the Virginia cases cited for controlling principles in *Allman*, 211 S.E.2d at 54,[11] are based on the decisions of this Court interpreting the Fourteenth

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[9] The Virginia Constitution merely defines certain classes of persons protected against governmental discrimination, none of which are applicable here. *Va. Const.*, Article I, Section 11 states:

> *Due process of law; obligation of contracts; taking of private property; prohibited discrimination; jury trial in civil cases.*— That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly; and that the *right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged*, except that the mere separation of the sexes shall not be considered discrimination.
>
> That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five. (Emphasis added)

[10] *Allman*, Appendix I, p. 5; Brief of Appellees, p. 44; *Williams*, Appendix I, p. 4, p. 16, p. 23; Brief of Appellees, p. 40.

[11] *Quoting County of Fairfax* v. *Parker*, 44 S.E.2d 9, 11-12 (Va. 1947):

> For a discussion of the underlying principles see *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016; *West Bros. Brick Co.* v. *City of Alexandria*, 192 S.E. 881. . . .

Amendment.[12] *Williams*, of course, relies on *Allman* and the same Virginia cases. It is therefore, inescapable that the Supreme Court of Virginia relied upon the Equal Protection Clause of the United States Constitution as the touchstone of its decisions in *Allman* and *Williams*.[13]

B. The Supreme Court Of Virginia Misinterpreted The Equal Protection Clause of the Fourteenth Amendment.

The Supreme Court of Virginia clearly relied on the Equal Protection Clause of the Fourteenth Amendment in reaching its decisions in both *Allman* and *Williams*. However, it is this Court, and not a state court, which is the final arbiter of important issues under the Federal Constitution. This Court's corrective power asserted and utilized in *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 557 (1930), should be exercised here because the court below, in its reliance on the Fourteenth Amendment, ignored or misapplied the rulings of this Court with respect to the proper interpretation of the equal protection guarantee as it affects matters of zoning and planning under the state police power.

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[12] The root case is *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). The landmark Virginia zoning case was *West Bros. Brick Co.* v. *City of Alexandria*, 192 S.E. 881 (Va. 1937), *appeal denied*, 302 U.S. 658, *rehearing denied*, 302 U.S. 781. *West Bros. Brick* relied on this Court's decisions in *Goriech* v. *Fox*, 274 U.S. 603 (1927); *Eubank* v. *Richmond*, 226 U.S. 137 (1912); *Bacon* v. *Walker*, 204 U.S. 311 (1906); *Zahn* v. *Board of Public Works*, 274 U.S. 325 (1927); *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922); *Nectow* v. *City of Cambridge*, 277 U.S. 183 (1928); and, of course, *Euclid*. All other Virginia cases listed by the court below cite and derive their principles from *West Bros. Brick*.

[13] If differences do not exist or if differences exist which cannot be justified before the court, then in conventional constitutional terms he claims a denial of the Equal Protection of the Law. D. Mandelker, *The Zoning Dilemma*, p. 8 (1971).

From *Euclid, supra, to Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974), this Court has determined that the Equal Protection Clause of the Fourteenth Amendment cannot be used to displace a rational exercise of the police power by the appropriate zoning authority. Unless a zoning ordinance involves a "suspect" classification or some "fundamental" right or liberty guaranteed by the Constitution, the judicial review of zoning legislation mandated by the Equal Protection Clause is clear.

> We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of Equal Protection Clause if the law be "reasonable, not arbitrary" (quoting *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920)) and bears "a rational relationship to a [permissible] state objective." *Reed* v. *Reed*, 404 U.S. 71, 76 (1971). *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 8 (1974).

1. The Legislation Invalidated by the Supreme Court of Virginia Met Constitutional Requirements as Perceived by This Court.

a. The property owners seeking rezoning were not members of a "suspect" class.

Both Mr. Allman and Mr. Williams were members of classes of landowners within the Upper Potomac Planning District and Pohick Planning District, respectively, whose properties had not been rezoned to the higher densities or more intense uses which the plans contemplated for some time in the future. There was another class of landowners in each planning district whose property had been rezoned to higher intensities than RE-1, some as high as shown by the plans for ultimate development potential. Neither classification was "suspect" as, for example, an ordinance might be which segregated an area for one race. *Vil-*

lage of Belle Terre v. *Boraas, supra,* 416 U.S. 1, 6 (1974), *citing Buchanan* v. *Warley,* 245 U.S. 60 (1917).[14]

b. Failure to rezone the subject properties did not invade a "fundamental" right.

The zoning decisions complained of did not invade a "fundamental" right. Both Mr. Allman and Mr. Williams complained that their properties would have been worth approximately $2.5 million more if the zoning ordinance had been amended pursuant to their wishes at the time they desired the amendment. This Court has found that economic expectations are not a "fundamental" right guaranteed by the United States Constitution. *Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 7 (1974). *See also San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 24 (1973).

The classifications involved no suspect class nor the invasion of a fundamental right. There is no violation of the Equal Protection Clause, then, if the acts are reasonable, not arbitrary, and bear a rational relationship to a permissible state objective. *Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 8 (1974).

c. The reaffirmation of the existing legislation was based on a permissible state objective.

The Board of Supervisors reaffirmed or declined to amend the existing RE-1 zoning district applicable to the Allman and Williams properties primarily because of present public facility considerations.[15] While disa-

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[14] The concept of equal treatment for landowners in Virginia has been codified in a uniformity provision, *Va. Code Ann.* § 15.1-488, *Appendix, infra* p. 89. This requires that the regulations of land in the same zoning district (*e.g.*, RE-1) apply similarly to all

[15] *See, e.g., Allman,* Appendix II, p. 24, Brief of Appellant, p. v; *Williams,* Appendix I, p. 42, Brief of Appellant, p. iii. The properties in that district.

greeing with the Board on conclusions, the Supreme Court of Virginia recognized this purpose in its opinions. In *Allman,* the court reviewed public facilities at length and even quoted a member of the Board of Supervisors, who dissented on the vote to retain RE-1, finding that the majority of the Board was concerned with inadequate public facilities. *Allman,* 211 S.E.2d at 51. In *Williams,* the court stated, "The Board takes the position that its denial of the rezoning requests was 'mandated by state law and deficiencies in public facilities.' " *Williams,* 216 S.E.2d at 35. *See Va. Code Ann.* §§ 15.1-427, 15.1-489, *Appendix, infra,* p. 84.

This Court has recognized specifically in *Euclid* that the "evils of overcrowding, and the like" are valid considerations for the legislature. 272 U.S. at 388. It is a very small jump, if there is a difference at all, to a recognition that a local legislature pursues a constitutionally permissible objective when it seeks to protect against overcrowding of people, whether permanently, or as in the instant cases temporarily, in relation to the public facilities which make life livable.[16] Since the

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Supreme Court of Virginia presumably recognized the validity of public facilities considerations by its lengthy factual review in each opinion. A lengthy factual review may not have been necessary. This Court has gone so far as to impute knowledge and intent to a legislative body in order to uphold a legislative act. *Welch* v. *Swasey,* 214 U.S. 91 (1909). *See also, Lindsley* v. *National Carbonic Gas Co.,* 220 U.S. 61, 78 (1911).

[16] *Berman* v. *Parker,* 348 U.S. 26 (1954); *Ybarra* v. *City of Los Altos Hills,* 503 F.2d 250 (9th Cir. 1974). *See also, Village of Belle Terre* v. *Boraas,* 416 U.S. at 13-14 (Marshall, J., dissenting).

The *Williams* majority makes passing reference equating the refusal to rezone as zoning with an impermissible exclusionary effect:

> Another discriminatory effect, although perhaps unintended of the Board's zoning policies was to elevate the cost of build-

objective was a permissible one, the causality or rationality of the relationship between the acts of the Board and the objectives remain.

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ing sites and housing and thus tend to exclude from portions of Fairfax County those persons who do not have 'substantial means' to 'afford to move into the County.' Zoning action with similar exclusionary effect was held impermissible in *Board of Supervisors of Fairfax County* v. *Carper, supra. Williams,* 216 S.E.2d at 41.

Additionally, unlike *Carper* and its progeny [*Oakwood at Madison, Inc.* v. *Township of Madison,* 117 N.J. Super, 11, 283 A.2d 353 (1971); *Appeal of Kit-Mar Builders,* 437 Pa. 237, 268 A.2d 675 (1970); *Appeal of Girsh,* 437 Pa. 237, 263 A.2d 395 (1970); *National Land and Investment Co.* v. *Kohn,* 419 Pa. 504, 215 A.2d 597 (1965)] the instant cases were temporary rather than permanent decisions, and were dictated by public facility considerations rather than a desire to exclude classes of persons from the locality.

The theme of Justice Sutherland's opinion in *Euclid* is that an exclusionary consequence is: (1) the essence of zoning; and (2) does not of itself rise to a cognizable due process objection.

A recent federal case demonstrates the approach this Court has mandated with respect to alleged exclusionary effects of zoning in the context of an alleged Fourteenth Amendment violation. In *Construction Industry Association of Sonoma County* v. *City of Petaluma,* No. 74-2100, U.S. Court of Appeals for the Ninth Circuit, Slip Opinion, August 13, 1975, the Court of Appeals reversed a district court decision voiding as unconstitutional certain aspects of the city's five-year housing and zoning plan. A particular feature of the Petaluma plan was to set a housing development growth rate not to exceed 500 dwelling units per year.

The plaintiffs had claimed that the plan was arbitrary and capricious and violative of the Fourteenth Amendment. Plaintiffs gave particular emphasis to the argument that the Petaluma plan constituted exclusionary zoning.

> Practically all zoning restrictions have as a purpose and effect the exclusion of some activity or type of structure or a certain density of inhabitants. *And in reviewing the reasonableness of a zoning ordinance, our inquiry does not terminate with a finding that it is for an exclusionary purpose.* We must determine further whether the exclusion bears any rational relationship to a legitimate state interest. If it does

d. There was a rational relationship between the reaffirmation of the existing legislation and a permissible state interest.

It is obvious that the higher the density of residential development allowed by zoning restrictions, the more people will exist on a particular piece of land, and the higher the demand for and impact on public facilities.[17] Therefore, if public facility capabilities were questionable, one logical approach would be to retain lower density zoning. This act—reaffirmance or denial of change—would bear a rational relationship to the permissible state objective of preventing undue density in regard to those facilities. The courts below, trial and appellate, however, were concerned with the substantive value of decisions made by the legislative body, where legislative change had been requested by individual landowners.

When Mr. Allman and Mr. Williams appeared before the Board of Supervisors requesting legislation, the Board after appropriate notice and hearings denied their requests. When Mr. Allman and Mr. Williams

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not, then the zoning regulation is invalid. If, on the other hand, a legitimate state interest is furthered by zoning regulations, we must defer to the legislative act. Slip Opinion, p. 13 (emphasis added).

In *Williams*, as in *Petaluma*, the dissenting opinion of Justice Cochran ably demonstrates that the temporary exclusion of a high density development was predicated on a legitimate state interest, the concern that new public facilities were needed more where there already was high density development and that the facilities were inadequate for the type of land use sought in the rezoning application.

[17] The fact that a higher density zoning would have a greater impact on the area was noted specifically by the court:

> The existing RE-1 zoning permitted 273 single family homes on the subject property. Allman proposed 988 units under the PDH-3 category. *Allman*, 211 S.E. 2d at 49.

appeared in court, they cited other zoning actions as examples of legislative inconsistency, each of which can clearly be distinguished from the respective properties.[18]

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[18] But even more significant than the higher density granted in the areas of Hiddenbrook, Herndon, Sterling Park and Reston, which either adjoin or are in close proximity to Allman, is the action of the Board taken on the application of the Clinch Corporation for a rezoning of its land. *Allman*, 211 S.E.2d at 53.

Mr. Allman, contending that he had been denied equal protection, argued that: his land was similarly situated to a number of properties in the area; some of these were treated differently by the legislature (rezoned to higher density); his property was not; and therefore he had been discriminated against. As examples of "similarly situated properties" he noted:

1) *Hiddenbrook* (151 acres) was rezoned to higher density six to twelve years (1960, 1965, 1966) before Allman was denied. It adjoined Allman and was only beginning to be developed at the time of the Allman denial in late 1971. (*Allman*, Stip. Exhibit 1, p. 4). It would, therefore, impact exactly the same public facilities at the same time.

2) *Herndon* is an incorporated town and as such controls its own rezonings. However, being within Fairfax County, residents impact County schools and other public facilities in the area of the Allman property. The Board, therefore, could not control the rezonings but was required to respond to their impact.

3) *Sterling Park* is a housing development in Loudoun County over which the Fairfax County Board had absolutely no control. The development does impact Fairfax County roads.

4) *Reston* is a world renowned experiment in building a new town which was formed in 1962 two and a half miles from Allman. Two years after Allman was denied and after a successful school bond issue affecting Reston (*Allman*, Reply Brief of Appellant, pp. 8-9), the Board rezoned two applications in Reston involving 625 acres. The Upper Potomac Comprehensive Plan (*Allman*, Stip. Exhibit 3) which covers the area (43,699 acres) had no phasing or timing provisions as did the plan in *Williams*. However, the plan had been consistently interpreted to call for growth and the provision of finite public facilities within the density core of Reston before rezoning outlying areas such as Allman. *Allman*,

This court has consistently indicated that there is no denial of equal protection where differently situated people are treated in different manners. In *Allman* and *Williams*, the only "similar situation" was that their

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211 S.E.2d at 53. In addition, the Fairfax County Circuit Court has ruled that Reston is entitled to priority in the provision of public facilities at least insofar as sewage treatment is concerned. (See *Appendix*, *infra*, p. 71).

5) *Clinch*, a mile from Allman, was rezoned to higher density about the time Allman was denied and was the main concern of the Virginia courts. Soon thereafter it was downzoned because the Board felt that a mistake had been made, but the downzoning was invalidated by subsequent litigation. At any rate, the impact of Clinch on public facilities was much smaller than that of Allman. Allman consisted of 300 acres, Clinch of 65; Allman would have generated 1,200 school children, Clinch 202 (*Allman*, Appendix II, p. 110); and Allman would have produced 6,000 vehicle trips per day, Clinch less than one-fifth those trips (*Allman*, Appendix III, p. 163).

In *Allman*, the Supreme Court of Virginia helps document the public facilities problems in the area as follows: *schools*—double shifts, extended days, temporary classrooms, accelerated building program, realignment of school district lines, busing (twice the normal distance, *Allman*, Appendix II, pp. 99-100), *Allman*, 211 S.E.2d at 51; *fire service*—not up to national standards used by Fairfax County (such standards recommended by the comprehensive plan, *Allman*, Stip., Exhibit 3, pp. 67-8) but "not critical," *Allman*, 211 S.E.2d at 51; *sewerage treatment*—allocation system because supply limited, *Allman*, 211 S.E.2d at 51; and *roads*—Route 228 through the Allman property was shown on the comprehensive plan for improvement to four lanes, however, the Virginia Department of Highways had not designated it for improvement in their ten-year plans. (*Allman*, Appendix II, p. 66, Appendix III, p. 165).

Mr. Williams' property was within the Pohick Planning District, an area with a comprehensive plan that was time-phased, unlike other comprehensive plans. (Discussion, note 29; *infra*.)

Williams' applications for rezoning were denied pursuant to the plan and the plan's rationale of coordinating public facilities to already existing development and to new areas by stages. Other properties had been rezoned to plan densities in the Pohick. How-

land was planned for more intense ultimate uses under the same comprehensive plans as the land of other persons whose applications for rezoning had been previously granted. No other factor exists by which a determination of "similarly situated" can appropriately be made.

2. The Misinterpretation of the Equal Protection Clause of the Fourteenth Amendment by the Supreme Court of Virginia resulted in its misapplication.

The Supreme Court of Virginia did not hold that economic expectations are a "fundamental" right guaranteed by the United States Constitution.[19] Rather,

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ever, no rezonings had occurred in the neighborhood where the Williams property lay.

As in *Allman*, the court in *Williams* helped to document public facility considerations in the area as follows: *roads*—evidence that road system inadequate for higher density development, *Williams*, 216 S.E.2d at 38 and 3; *schools*—no "serious" deficiency, neighborhood school policy where young children should walk to neighborhood schools only an "ideal," children could be "absorbed" without "undue burden," *Williams*, 216 S.E.2d at 38, possible double shifts, and temporary classrooms, *Williams*, 216 S.E.2d at 43 (dissent); and *sewerage*—treatment facilities not presently available, *Williams*, 216 S.E.2d at 38.

[19] If the court below had considered economic expectation to be a "fundamental" right, it would follow that the court would then require the Board to show a compelling state interest to have the legislation upheld. *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969). In the very sensitive area of a "fundamental" right, such as in a First Amendment guarantee,

> [i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation," *Thomas* v. *Collins*, 323 U.S. 516 (1945). *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963).

At any rate, speculation is academic because this Court has held that economic expectations are not a fundamental right. *Village*

the court below seemed to hold that a selective denial of economic advantage raised, *per se*, violations of equal protection. In *Allman*, the Supreme Court of Virginia paraphrases the trial court:

> . . . Allman, although entitled to equal treatment in the consideration of his application, had been subjected to discrimination, had not been accorded the same treatment as other applicants for rezoning, and had been deprived of substantial property rights. *Allman*, 211 S.E.2d at 52.
> *See also Williams*, 216 S.E.2d at 36 and 39 for parallel reasoning. [20]

The court notes in both cases that the properties would have been more valuable if rezoned. *Al-*

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of Belle Terre v. *Boraas*, 416 U.S. 1, 8 (1974). Cases in the lower federal courts in the last decade [*Stone* v. *City of Maitland*, 446 F.2d 83 (5th Cir. 1971); *Yecko* v. *Township of Penn.*, 387 F.2d 126 (3rd Cir. 1967); *Grams* v. *City of Cudahy*, 226 F. Supp. 385 (E.D. Wisc. 1964)],

> "contain no implication that courts should consider the private detriment suffered and attempt to balance it against the public interest; rather the rational relationship required by the Fourteenth Amendment is a causal relation between the regulation and effectuation of a proper public purpose. A regulation therefore that reasonably promotes the public interest by prohibiting a harm or encouraging a benefit will be upheld, even though it burdens private individuals." Donaldson, *Regulation of Conduct in Relation to Land—The Need to Purge Natural Law Constraints From the Fourteenth Amendment*, 16 Wm. and Mary L. Rev. 187, 209-10 (1974).

See also San Antonio School District v. *Rodriquez*, *supra*, 411 U.S. 1, 24 (1973) ". . . at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages."

[20] It should be noted that neither Allman, Williams, the trial court nor the appellate court claimed or found a denial of procedural due process based on any lack of the notice or hearing requirements being complied with.

lman, 211 S.E.2d at 50, *Williams*, 216 S.E.2d at 39. In other words, other landowners received higher, more valuable zoning, Allman and Williams did not, and, therefore they did not receive equal treatment (or equal profits).

The court below apparently held the Board's failure to legislate equal profits to be a violation of equal protection because in neither case did the court find a denial of due process based on a taking or confiscation. In both cases the same expert witness for Allman and Williams testified that the RE-1 (existing zoning) could be developed at a profit. (*Allman*, Appendix III, p. 14; *Williams*, Appendix I, p. 137).[21] As the dissent in *Williams* notes, in both cases "the present RE-1 zoning does not of itself effect an unconstitutional denial of due process by depriving the applicants of all beneficial use of their property." *Williams*, 216 S.E.2d at 44.

That the Supreme Court of Virginia perceived a *per se* violation of equal protection is further exemplified by that court's failure to address whether the lines drawn as a means to a permissible state end were rational.

Line drawing is the essence of the police power and deference to it is also the touchstone of this Court's approach to zoning under the Equal Protection Clause of the Fourteenth Amendment. Much has been made

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[21] It should be noted that the Supreme Court of Virginia in both *Allman*, 211 S.E.2d at 50, and *Williams*, 216 S.E.2d at 39, states both could develop "without loss" and "not lose money" respectively. Apparently, the court is quoting statements from the *Allman* Appellees briefs (*Allman* Brief of Appellees, p. 43) rather than from the testimony of the Allman and Williams witness in the records, that development could be at a profit. In *Williams*, this is correctly stated by the dissent, 216 S.E.2d at 44 and 46-47.

of the fact that the Williams and Allman properties were similarly situated to those of other landowners whose property fell, for them, on the more fortunate side of the line. But this Court answered that objection in *Euclid* where it candidly acknowledged what must be said if zoning and planning are to be possible and if every zoning decision is not to be litigated to destruction on spurious equal protection grounds: [The line] "which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions." *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 387 (1926). And more recently:

> When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successsive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark. *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 9, note 5 (1974), *quoting Louisville Gas Co.* v. *Coleman*, 277 U.S. 32, 41 (1928) (dissenting opinion).

Recent zoning cases in the lower courts show that on the whole the meaning of that "respect' for line-drawing in zoning, spoken of in *Belle Terre*, has been well understood. An analysis of these cases exposes the degree to which the decisions below depart from the

traditional approach in zoning cases by courts to a charge of a violation of the Equal Protection Clause.

Ybarra v. *Los Altos Hills,* 503 F.2d 250 (9th Cir. 1974), reveals the extent to which the Supreme Court of Virginia misapplied the Equal Protection Clause. In *Ybarra,* the Ninth Circuit concluded its equal protection analysis as follows:

> Since there is no suspect classification requiring a strict standard of review, the town need only show that the ordinance bears a rational relationship to a legitimate governmental interest. *Id.* at 40, 93 S.Ct. 1278. Here the ordinance is rationally related to preserving the town's rural environment. See *Village of Belle Terre* v. *Boraas,* —— U.S. ——, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974). The ordinance does not violate the Equal Protection Clause. *Id.*, at 254.

Absent any grounds for concluding that a "fundamental liberty" or a "suspect classification" is present, all Fairfax County is required to show is a rational relationship behind its decisions to change or not to change the existing zoning ordinance and "a legitimate governmental interest."

Another case which contrasts sharply with *Williams* and *Allman* and which illustrates the appropriate approach to zoning where an equal protection objection has been raised is *Stone* v. *City of Maitland,* 446 F.2d 83 (5th Cir. 1971). The Court of Appeals in *Maitland* relied on this Court's famous distinction between permissible legislative differential treatment of similar subject matter and a violation of the Equal Protection Clause in *Williamson* v. *Lee Optical Company of Oklahoma,* 348 U.S. 483, 489 (1955):

> The problem of legislative classification is a perennial one admitting of no doctrinaire definition.

> *Evils in the same field may be of different dimensions and proportions, requiring different remedies.* Or so the legislature may think. * * * Or the *reform may take one step at a time*, addressing itself to the phase of the problem which seems most acute to the legislative mind * * * The legislature may select one phase of one field and apply a remedy there, neglecting the others. * * * The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. (Emphasis added.)

Upon application of the *Williamson* v. *Lee Optical* analysis to the *Allman* and *Williams* cases, it is evident that the Supreme Court of Virginia misapplied the meaning of equal protection as defined in the decisions of this Court. The legislature does not have to treat Mr. Allman's rezoning application identically with that of Clinch.

Similarly, in *Williams*, the fact that rezoning applications in adjacent neighborhoods did not produce identical results to those rezoning applications in the neighborhood of the Williams property does not violate equal protection. As the Court of Appeals said in *Maitland*:

> It is important to recognize exactly what the Equal Protection Clause entails. If the legislature senses an evil, it may deal with it. At the same time it is under no compulsion to deal with all other evils that are seen to be equally serious. *Stone* v. *City of Maitland*, 446 F.2d 83, (5th Cir. 1971).

The Equal Protection Clause is not a strait jacket to frustrate zoning and planning. As a matter of federal constitutional law, the question is whether the com-

plained of line-drawing is permissible under the Equal Protection Clause. In *Belle-Terre*, this Court said unequivocally that legislative line-drawing in zoning was not prohibited by the Equal Protection Clause:

> But every line by a legislature leaves some out that might well have been included. That exercise, however, is a legislative not a judicial function. *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 8 (1974).

That one falls on a different side of a line than does one's neighbor may be in some ultimate perspective an inequity but it is not an inequity which arises to a constitutional dimension.

The shallowness of the landowner's allegations of discrimination in these cases is particularly illustrated in *Allman*. There the landowner stressed that he was treated differently than Clinch, though allegedly similar under the comprehensive plan. And in truth the Fairfax County Board of Supervisors had conceded mistake. *Allman*, 211 S.E.2d at 53. But a mistake by government with respect to one individual does not mean that the government violates equal protection unless it makes the same mistake with respect to every other individual so situated. Davis, *Administrative Law Cases—Text—Problems*, p. 552 (1973). What the Supreme Court of Virginia has done is to take a particularly rigid and undefined conception of estoppel against the government which would give a windfall for those as to whom no mitake has been made, and elevate that estoppel to a false constitutional status.

If true, as the Supreme Court of Virginia indicates, the Equal Protection Clause has become an ob-

stacle to the fundamental task of government.[22] Governmental error in Virginia is set in concrete on a misinterpretation of the Federal Equal Protection Clause. Equal Protection principles, properly understood, particularly in zoning, are far more sensible and flexible as even the most cursory reading of *Euclid* and *Belle Terre* reveals.

The landowners' broader bootstrap-estoppel argument, that other areas where zoning had occurred were just as deficient in public facilities and therefore equal protection mandated rezoning for their deficient area, also apparently was accepted by the court below.[23]

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[22] Even where courts have given a windfall to one taxpayer because a mistake benefiting another taxpayer similarly situated had been made, no suggestion has ever been made that such equality of treatment had any source in equal protection analysis. *Cf. IBM v. United States*, 343 F.2d 914 (Ct. Cl. 1965), *cert. den.* 382 U.S. 1028 (1966).

[23] Apparently, this accommodation [school children from Allman's project] would occur in *the same manner the County has accommodated the steady increase in school population in other sections of the County.* This could be done, Whitworth testified, by an accelerated building program, temporary classrooms, extending the school day, going on a double shift, realignment of school district lines and transporting children from congested areas to areas where there were vacant or unfilled classrooms. *Allman*, 211 S.E.2d at 51. (Emphasis added.)

Fire services for Allman did not meet national standards used by the County but the court said this was "not critical" and "roughly the same as that provided numerous other areas in the County." *Id.*

In *Williams*, the court said that there was evidence of road inadequacy but other evidence that it would be improved sometime in the future. In the past, road improvement had followed development. *Williams*, 216 S.E.2d at 38. Also, the neighborhood school concept, where small children could walk to school, was labeled by the court as an "ideal" not followed in practice. *Id.*

This theory by the court below seems to invalidate *Va. Code Ann.* § 15.1-427 which states that the planning and zoning enabling chapter is intended to improve the health, safety and general welfare. This theory of equal protection, in other words, requires the continuance of the lowest common denominator of public facility inadequacy countywide.

This estoppel-equal protection theory not only violates the mandates of the state enabling act, but it also violates the very essence of a police power action for the health, safety and general welfare.

The Supreme Court of Virginia obviously substituted judicial judgment for the legislative judgment of the Board of Supervisors. In both cases, the court stated that there was evidence of public facility adequacy and inadequacy. The trial court "could have found" present or future availability, *Allman,* 211 S.E.2d at 51. "There was evidence of road inadequacy and potential adequacy," *Williams,* 216 S.E.2d at 38. The appellate court also took new evidence on appeal: "Allman's counsel, in his brief and at the bar of this court, said that . . ." *Allman,* 211 S.E.2d at 53.[24]

The fundamentally mistaken issue posed by the court below was not whether there was any evidence to support the legislature but whether there was evidence to support the trial court. *Williams,* 216 S.E.2d at 36. The court also recites and thereby approves the fact

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[24] *Compare Board of Supervisors of James City County* v. *Rowe, supra,* 216 S.E.2d 199, 211, note 10 (Va. 1975)—"In oral argument, the Board volunteered information that. . . . We will not notice such information *de hors* the record." (*Appendix, infra,* p. 44).

that a stipulation solicited at trial by the judge changed the factual setting from that which had faced the legislature. *Williams,* 216 S.E.2d at 39 (*see also Williams,* Appendix I, pp. 29-31).

The classifications of the Fairfax County Zoning Ordinance applicable to the subject properties clearly received strict judicial scrutiny for their justification. However, to engage in strict judicial scrutiny on the basis of federal law, the court must first find that a "fundamental" right has been invaded or that a "suspect" classification was created. *San Antonio School District* v. *Rodriguez,* 411 U. S. 1 (1973). The court did neither. Economic expectations are not a "fundamental" right. *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974). Those whose property has not been rezoned to the long-range densities recommended in a comprehensive plan have none of the

> . . . traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. *San Antonio School District* v. *Rodriguez, supra,* 411 U. S. at 28.

Therefore, the court below erred in invading the legislative prerogatives without basis pursuant to an equal protection review. It is not the province of the courts "to create substantive constitutional rights in the name of guaranteeing equal protection of laws." *Id.,* 411 U.S. at 33.

Petitioner, therefore, respectfully submits that the misinterpetation of the Equal Protection Clause of the

Fourteenth Amendment resulted in a misapplication of the Constitution of the United States.

II. DID THE SUPREME COURT OF VIRGINIA MISAPPLY FEDERAL CONSTITUTIONAL LAW ON DUE PROCESS?

A. A Finding Of A Denial Of Due Process, Based Upon A Denial Of Equal Protection, May Not Stand If There Has Been No Constitutional Violation Of The Equal Protection Clause.

The analysis of the Supreme Court of Virginia creates a constitutional domino effect in which a finding of an equal protection violation necessarily results in a finding of a due process violation which necessarily results in the court finding the legislative act invalid. This is clearly stated by the court in *Board of Supervisors of James City County* v. *Rowe,* 216 S.E.2d 199, 210 (Va. 1975), the land use case decided on the same day as *Williams*:

> When a land use permitted to one landowner is restricted to another similarly situated, the restriction is discriminatory, and, if not substantially related to the public health, safety, or welfare constitutes a denial of equal protection of the laws. A restriction on the right to use which thus *denies equal protection also constitutes a "taking"* of one of the most valuable components of the package of private property rights, and, absent just compensation, *such taking is a denial of due process of law.* (emphasis added).

The same constitutional domino effect is evident in both the *Allman* and *Williams* decisions:

> His evidence established a course of action by the Board that was inconsistent and discriminatory. A discriminatory action is an arbitrary and a capricious action, and bears no reasonable relation to

> the public health, safety, morals or general welfare. *Allman,* 211 S.E. 2d at 55.
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> * * *
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> . . . (4) it was discriminatory and *therefore* arbitrary and capricious to deny higher-density zoning to the land in question. *Williams,* 216 S.E.2d at 36 (emphasis added).
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> * * *
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> Mere inequality of treatment among neighboring landowners is not of itself unconstitutional. Any zoning ordinance may involve unequal treatment, but such unequal treatment is proscribed only when it is invidious, or "arbitrary and capricious." In *Allman* we affirmed the rule that unequal treatment of similarly situated landowners is "arbitrary and capricious" when it lacks a rational basis and bears no substantial relation to the public health, safety, morals, or general welfare. *Id.* at 47 (dissenting opinion).

The fact that a finding of discrimination or denial of equal protection was a necessary underpinning of any due process determination is evident in the dissent of Justice Cochran. He states that although the lower court's findings concerning the present or future availability of public facilities "may be sufficient to show that the requested rezoning would be reasonable, [it] is not of itself sufficient to invalidate the present zoning as to applicants' lands." *Id.* at 44.

Inasmuch as the first domino in the series above was the court's determination that equal protection was violated, the other dominoes cannot fall if there was no legitimate finding of an equal protection violation. The major, if not sole, basis for a finding of due process violation was the determination that the property owners had been discriminated against in such manner as

to deny them equal protection.[25] When there was in fact no equal protection violation, there then logically could have been no due process violation, whether such perceived violation conflicted with the Federal or State Constitutions. The third and last domino, the legislation itself, must logically stand.

B. The Supreme Court Of Virginia Misinterpreted The Due Process Clause Of The Fourteenth Amendment

1. The Supreme Court of Virginia Relied on the Due Process Clause of the Fourteenth Amendment.

The Supreme Court of Virginia in *Allman* based its holding on the Fourteenth Amendment to the United States Constitution and this Court's interpretations thereof. The court cited *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), and *West Bros. Brick Co.* v. *City of Alexandria*, 192 S.E. 881 (Va. 1937), *appeal dismissed*, 302 U.S. 658, *rehearing denied*, 302 U.S. 781, as the seminal cases for the general principles governing its review of zoning laws. *Allman*, 211 S.E.2d at 54. *West Bros. Brick*, the landmark Virginia case on zoning, is clearly based on this Court's interpretations of the Fourteenth Amendment to the United States Constitution. In addition to *Euclid*, the Supreme Court of Virginia in *West Bros. Brick* cited a number of United States Supreme Court cases as authority for

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[25] The tension between the ideal of legal and political equality and the fact of economic inequality sets up many of the basic conflicts in American planning. *Differential treatment is of the essence in American land use controls.* Since by definition a formal and mechanical equality is out of the question, the only way to provide the essence of equal treatment for these basic social interests is by an overall planning analysis of all the major factors bearing upon the situation. N. Williams, 1 *American Land Planning Law* § 1.01. (1974) (emphasis added).

its decisions.[26] The other cases cited by the court in *Allman* are based on *West Bros. Brick* and the federal principles enunciated therein.[27]

The *Williams* case is based on *Allman* and the same principles and line of authority which controlled that decision. *Williams*, 216 S.E.2d at 40-41. The Supreme Court of Virginia may no more misinterpret the due process clause of the Fourteenth Amendment than it may misinterpret the equal protection clause. *See Minnesota* v. *National Tea Co.*, 309 U.S. 551. (1930).

2. The Supreme Court of Virginia Substituted Its Judgment for That of the Legislature.

In *Allman*, the Supreme Court of Virginia made findings of fact which it substituted for determinations made by the Board;[28] in *Williams*, the court up-

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[26] See cases cited at footnote 12, *supra.*

[27] *See Fairfax County* v. *Parker*, 44 S.E.2d 9, 12, (Va. 1947) (*citing West Bros. Brick* and *Euclid*); *Board of Supervisors* v. *Davis*, 106 S.E.2d 152, 157 (Va. 1958) (*citing West Bros. Brick*); *Board of Supervisors* v. *Carper*, 107 S.E. 390 (Va. 1959) (*citing West Bros. Brick*). *See also Boggs* v. *Board of Supervisors*, 178 S.E.2d 508, 510 (Va. 1971); *Board of Supervisors* v. *DeGroff*, 198 S.E.2d 600, 601 (Va. 1973); *Fairfax County* v. *Snell Corp.*, 202 S.E.2d 889, 893 (Va. 1974); *Richmond* v. *Randall*, 211 S.E.2d 56, 60 (Va. 1975) (all *citing Carper* and thereby *West Bros. Brick*).

[28] The Board's posture in the *Allman* case was basically:

(1) the Board had planned that in the long-range future, the area of the County that included the Allman tract would be permitted to develop at a density of 2-3 units to an acre (*Allman*, Stip. Exhibit 3). This density would require the immediate provision of certain public facilities such as sewer and water. Other facilities, such as schools, roads, fire service, would be required shortly after development. (*Allman*, Appendix II, pp. 172-73, 194, 202, 207).

(2) for the present, if the properties in this immediate area wished to develop, they could do so at the present zoning density.

held findings of fact which the trial court had substituted for determinations of the Board.[29]

This density does not generally require the provision of major public services such as sewer and water, but can be developed on wells and septic systems; further the impact of this density development is obviously less on the major facilities of roads and schools. (*Allman*, Appendix III, p. 14).

(3) for the present, the Board had not planned for provision of certain major facilities which it felt to be prerequisite for development at increased densities (*Allman*, Appendix II, pp. 172, 194, 202). Prior planning for one critical facility, sanitary sewer, had recently been disrupted by an office of the United States Department of Interior, now the Environmental Protection Agency, by the reduction of capacity of the Blue Plains Regional Pollution Control Plant. (*Allman*, Appendix II, p. 39-40; 214-15. Stip. Exhibits 4 & 5).

The Supreme Court of Virginia, in its opinion, itself noted that ". . . the witnesses for the Board stressed the present inadequacy of all public facilities in the area." *Allman*, 211 S.E.2d at 50. However, the Court went on to state:

> There was evidence before the lower court from which it reasonably could have found that at the time the Board considered the Allman application the necessary public facilities were either available or would become available by the time the project had been developed. *Allman*, 211 S.E.2d at 51.

[29] The Board's posture in the *Williams* case was basically:

(1) the Board had planned for the north watershed (Main Branch) to develop at urban density during the period after 1969, and for the provision of public facilities to be directed to this watershed during this period. (*Williams*, Stip. Exhib. 11).

(2) the Board had planned for the central watershed (Middle Run) to begin to develop to urban density between 1975 and 1980; and for the south watershed (South Run) to develop after 1980. (*Williams*, Stip. Exhib. 11). *See also Williams*, 216 S.E.2d at 42. (dissenting opinion).

(3) "the Board, which plans to provide such facilities, had determined to change the density by rezoning after public facilities were available or reasonably expected." *Williams*, 216 S.E.2d at 45-46 (dissenting opinion).

Williams, with property in the Middle Run, appeared before the Board in 1972 requesting that his property be rezoned at that

The federal courts have consistently refused to substitute their judgment for that of legislative bodies. *Standard Oil* v. *City of Charlottesville*, 42 F.2d 88 (4th Cir. 1930); *Downham* v. *City of Alexandria*, 58 F.2d 784 (E.D. Va. 1932).

In the recent case of *Construction Industry Association of Sonoma County* v. *City of Petaluma*, No. 74-2100 (9th Cir., August 13, 1975), the District Court was reversed because the Court of Appeals concluded that the trial court had weighed the wisdom of the Petaluma plan rather than its reasonableness.

> Being neither a superlegislature nor a zoning board of appeal, a federal court is without authority to weigh and reappraise the factors considered or ignored by the legislative body in passing the challenged legislation. The reasonableness, not the wisdom, of the Petaluma plan is at issue in this suit. Slip Opinion, p. 13.

The Ninth Circuit, in making these observations is clearly following the precedents of this court. *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915); *Zahn* v. *Board of Public Works*, 274 U.S. 325 (1927). When a state court sets aside a legislative decision on federal constitutional grounds, that court is then bound by this

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time. The Board denied the request, basing such denial on the plan considerations noted above with emphasis on the present unavailability of public facilities and the statement by Williams that he planned to begin development in six to eight months. (*Williams*, Stip. Exhibit 4, p. 16).

The Board, by virtue of its decision not to rezone the Williams property, had determined that public facilities were not available nor programmed to be available in the reasonably near future.

However, one of the "four important findings" repeated in the *Williams* decision was that "public facilities were or soon would be available to serve the land in question . . ." *Williams*, 216 S.E.2d at 39. The court found the record to be supportive of this finding.

Court's interpretations and may not substitute its judgment for that of the legislature.[30]

The majority opinion in *Williams* says, in essence, that in the opinion of that court the landowners in question should have been granted a higher density zoning classification. But that difference in opinion cannot authorize a constitutionally compelled conclusion that the refusal to rezone was arbitrary and capricious.

In dissent, Justice Cochran said in *Williams*:

> The uncontradicted evidence shows that, unlike the zonings invalidated in *City of Richmond* v. *Randall, supra,* and in *Boggs* v. *Board of Supervisors,* 178 S.E.2d 508 (Va. 1971), *the present RE-1 zoning does not of itself effect an unconstitutional denial of due process by depriving the applicants of all beneficial use of their property.* It was stipulated that the property could be developed at some profit under RE-1 zoning. The evidence indicates that much greater profit could be realized from higher density development. (Emphasis added).
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> The evidence shows that higher density zoning for the subject lands would not be unreasonable. Our concern, however, is the reasonableness of the Board's actions in continuing the present zoning. If that is fairly debatable, then the denial of the applications must be upheld.
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> The Board's evidence shows that its policy was to retard development in the Middle Run until

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[30] The Supreme Court of Virginia acknowledges this concept in *Allman*, where it discusses the impropriety of courts usurping or invading the exercise of legislative power. *Allman,* 211 S.E.2d at 55.

> public facilities could be made available to other areas already zoned to higher density and under development. *Williams,* 216 S.E.2d at 44 (dissenting opinion).
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> The classifications established here by the Board were based on a rational plan for orderly development of a subwatershed. The Board was justified in pursuing its policies of encouraging greater density in areas already zoned for such development by locating public facilities there before rezoning other lands and incurring the financial burden of installing additional public facilities.
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> The Board adduced sufficient evidence of the reasonableness of its actions in denying the applicants' request for higher density zoning to make the matter at least fairly debatable. *Reasonable men could disagree as to the advisability of approving the applications at the time they were considered by the Board.* Consequently, I conclude that the chancellor erred in ruling that the Board's legislative actions in denying the applications and in continuing the zoning were arbitrary, unreasonable, and capricious. *Id.*, at 47 (emphasis added).

When members of a distinguished state supreme court divide on the question of the "reasonableness" of a zoning classification, it seems impossible to conclude that the minority position on the matter is "unreasonable."[31] It is clear that the objection the Supreme

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[31] Legislation falls within the "due process" clause when it is such as rational men may approve. Taken seriously, this conception makes of our courts lunacy commissioners sitting in judgment upon the mental capacity of legislators and, occasionally, of judicial brethren. . . . The fact, then, that rea-

Court of Virginia had with the action of the Fairfax County Board of Supervisors in *Williams* was not with the reasonableness of the refusals to rezone in *Williams* but with its wisdom. When such an objection claims for its legal justification the language of the due process clause of the Fourteenth Amendment, such judicial substitution of legislative judgment becomes constitutionally unacceptable.

Petitioner submits that the "crucial question" under the Fourteenth Amendment is not whether the Supreme Court of Virginia, giving due deference to the trial court's finding of fact, can find evidence to support the trial court and reverse only if the trial court is clearly wrong. *Williams,* 216 S.E.2d at 36. The deference afforded the trial court should have been given to the legislature. Lengthy argument in the Briefs of Appellants showed the Board's contention that the trial courts substituted their judgment. For example, the trial court in *Allman* stated as constitutional principles:

> An owner has a basic vested right to use his property for any legitimate purpose as long as it does not constitute a nuisance nor is contrary to

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sonable men approve of specific legislation does not prevent it from being a violation of "due process of law." Donaldson, *Regulation of Conduct in Relation to Land—The Need to Purge Natural Law Constraints From The Fourteenth Amendment,* 16 Wm. and Mary L. Rev. 187, 195 (1974), *quoting* Cohen, *Transcendental Nonsense,* 35 Colum. L. Rev. 809, 819 (1935).

See Miles v. *Dade County Board of County Commissioners,* 260 So.2d 553, 555 (Fla. 1972)—"fact that Zoning Appeals Board held a view . . . opposite to . . . county commissioners . . . furnished indication that the matter was fairly debatable."

the health, safety and general welfare of the public. (*Allman,* Order, Appendix I, p. 11.) [32]

* * *

However, under the free enterprise system and under his basic vested property rights, you can't deny him economic gain advantages. (*Allman,* Oral Ruling, Appendix III, pp. 219-20.)

* * *

What's fair for the goose is fair for the gander. (*Allman,* Appendix II, p. 220.)

The appellate court compounded the error by giving a presumption of correctness to the trial court.[33] Instead of searching for any evidence to uphold the trial

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[32] As one looks back along the historic road traversed by the law of land in England and in America, one sees a change from the viewpoint that he who owns may do as he pleases with what he owns, to a position which hesitatingly embodies an ingredient of stewardship; which grudgingly, but steadily, broadens the recognized scope of social interest in the utilization of things. The first sixty-eight chapters of this Treatise are full of illustrations of these transitional changes in the law. R. Powell and P. Rohan, *Powell on Real Property,* p. 852, (abridged ed. 1968).

Compare, trial court's cited statement *with Respublica* v. *Philip Urbin Duquet,* 2 Yeates 493 (Pa. Sup. Ct. 1799).

[33] The failure of the trial courts to afford the Board a presumption of validity and the reversal of that presumption were treated at length. (*Allman,* Brief of Appellant, pp. 50-68; *Williams,* Brief of Appellant, pp. 33-49.) Since *Allman* is the lead case, several quotes from the trial judge, later approved *sub silentio* by the reviewing court, should show the reversal of presumption.

> You as their counselor were put in an untenable position, because you've got to scrounge around and dig up technical defenses to try and put them in this record in order to support the verdict, the decisions of the Board. (Statement of trial court to Board's counsel at trial—*Allman,* Appendix II, p. 213.)
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> Can you show that that [sewer treatment capacity] was one of the major factors that the Board waived [sic, weighed]

court, the appellate court should have searched for any reasonable basis to uphold the legislature's judgment.[34]

3. The Substitution of Judgment by the Supreme Court of Virginia was a Misapplication of the Due Process Clause of the Fourteenth Amendment.

In *Ferguson* v. *Skrupa,* 372 U.S. 726, 731-32 (1963), Justice Black, speaking for the Court, made the follow-

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in considering this? (Question by trial court to Board's counsel—*Allman,* Appendix II, p. 213.)

In *Williams* there was also a clear indication very early that the judge would not give the legislature a presumption of validity and would in fact reverse that presumption. In opening statement, counsel for Mr. Williams said that the county could not demonstrate an inadequacy of public facilities. The court inquired about sewer treatment. Counsel for Mr. Williams admitted there was none but stated that there would be three years later. The court then solicited a stipulation that Williams would not use a favorable ruling as a lever to develop before sewer treatment capacity became available. (*Williams,* Appendix I, pp. 29-31 of transcript I.) This occurred before any evidence was taken. The court presumed that development would take six to seven years (*Williams,* Appendices I, p. 76; II, pp. 360, 460, 480; III, p. 525) although Mr. Williams had earlier stated to the Board of Supervisors that it would be half completed in two years (Stip. Exhibit 4, p. 16). This changed the whole time frame involved. The Board had to consider the time frame of 1972 (hearing before Board) to 1976 (four years for Williams to build). The trial court with its stipulation was considering 1976 (sewer treatment) to 1983 (seven years to build), an entirely different set of facts from that facing the legislature. Obviously, a substitution of judgment occurred.

[34] This Court has gone so far as to allow the state court to impute knowledge and motives to a legislative body in order to sustain the constitutionality of legislation which was challenged on due process and equal protection grounds. In fact, after noting the holding of the state supreme court, this Court went on to impute further knowledge and rationale to the legislative body to sustain the decisions of both the court and the legislature. *Welch* v. *Swasey,* 214 U.S. 91 (1909).

ing declaration on the impropriety of using due process analysis as a means to substitute judicial for legislative judgment:

> We refuse to sit as a "superlegislature to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions because they may be unwise, improvident, or out of harmony with a particular school of thought." [35]

In *Williams* and *Allman*, the court below engaged as a *de novo* matter in the pros and cons of particular refusals to make new zoning classifications on federal constitutional grounds.

In *Allman*, the courts below have substituted their judgment for that of the zoning authority, despite ritual incantations to the contrary. In their view, since Clinch's land was rezoned and Reston's applications were granted, it was arbitrary, and, *a fortiori*, unreasonable to deny Allman's application for rezoning. But the mandate of this Court in *Euclid* was that the zoning decision stands if it furthers a legitimate

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[35] This Court, in zoning cases, had declared its unwillingness to use the due process clause of the Fourteenth Amendment as a vehicle to supplant the legislative authority's zoning judgment long before this Court abandoned substantive due process analysis in other areas of economic regulation. Constitutional scholars have commented on the disfavor this Court very early indicated toward the technique of using a doctrine of reasonableness to scrutinize legislative judgment. Professor Gunther describes this Court's aversion to substantive due process as follows:

> During the heyday of economic due process, a divided Court sustained a general zoning ordinance as a valid "police regulation," in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). Gunther, *Constitutional Law: Cases and Materials*, p. 602 (1975).

state interest. This mandate can accomplish its appointed task (*i.e.*, giving a proper deference to a valid exercise of the police power of the state), only if it is understood that the due process test is whether it can be said that the zoning decision bears no reasonable relationship to a legitimate state interest, not whether a particular zoning decision appears reasonable to the reviewing court.

In the instant cases, *Williams* and *Allman*, the Court below recites arguments showing the utility of the approach to the instant zoning classifications favored by the landowners in each of those cases. But such arguments must be won or lost before the zoning authority and not the courts.[36]

In *Allman*, the Supreme Court of Virginia gives lip service to the doctrine, well established under the de-

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[36] In *Ferguson* v. *Skrupa*, 372 U.S. 726, 730-31 (1963), Mr. Justice Black speaking for the Court sounded the death knell of substantive due process:

> We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.
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> *Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us.* (emphasis added).

By way of contrast, in *Stone* v. *City of Maitland*, 446 F.2d 83, 87 (5th Cir. 1971), the Fifth Circuit fully applied the test set forth in *Euclid:*

> Thus in testing the zoning ordinances before us here the sole question is whether there is a rational relationship between the ordinance and the promotion of some aspect of the City's police power—a label which describes the full range of legitimate public interests. *Quoting Mayhue* v. *City of Plantation, Florida*, 375 F.2d 447, 449 (5th Cir. 1967).

cisions of this Court, that the legislative judgment will not be disturbed with respect to zoning unless it is unreasonable and arbitrary. The problem is not that the court below has not stated the appropriate constitutional doctrines established for zoning cases where either equal protection or due process violations are alleged under the Fourteenth Amendment. The problem is rather that the court misapplied these doctrines. The test is not whether a court thinks a landowner's preferred use for a piece of property is a reasonable one. The test is rather whether a zoning authority's contrary judgment is reasonable with respect to the appropriate classification for that piece of property. After stating at length the doctrine that a presumption of validity is owed to the zoning authority's judgment, the court then concludes that Allman had overcome the presumption. The court's statement of the remand to the trial court betrays that the basis for its conclusion that Mr. Allman overcame the legislative presumption rests on a *judicial* judgment that his use of the land would be reasonable.[37]

This Court repudiated the doctrine of substantive due process in zoning before it rejected it across the board in matters affecting economic and property rights. *Compare Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926), with *North Dakota State Board* v. *Snyder's Drug Stores*, 414 U.S. 156 (1973). The Fifth

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[37] *It having been established by the evidence that the uses of the property proposed by Allman are reasonable uses* and that either zoning classification PDH-3 or zoning classification R-12.5 would permit such uses, the trial court will also enjoin the Board during the prescribed period from taking any action which would disallow these uses by Allman (appellees). *Allman*, 211 S.E. 2d at 55-56.

Circuit has accurately summarized the movement of the law in this area:

> It has now been a generation since the Supreme Court's due process scythe cut down all national efforts towards economic recovery and endangered the role of the judiciary as a co-equal branch of government. But, oddly enough, ten years *before* the great Court battle of the thirties, the . . . Court wrote an opinion in language . . . reminiscent of *Ferguson* . . . . It must be said that the (zoning) ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. *Euclid* v. *Ambler Realty Co.*, 1926, 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.E. 303, 314. *Stone* v. *City of Maitland*, 446 F.2d 83, 87 (5th Cir. 1971).

This Court's careful scrutiny is required to prevent a re-emergence of the substantive due process scythe at the state court level which threatens to cut down all efforts toward orderly zoning and planning.

III. THE GROUNDS OF DECISION IN THE OPINIONS BELOW ARE FUNDAMENTALLY ROOTED IN FEDERAL CONSTITUTIONAL LAW; CERTIORARI SHOULD BE GRANTED SO THAT THIS COURT MAY REVIEW THE CORRECTNESS OF THE APPLICATION OF THOSE PRINCIPLES.

It may be contended that the identification of the true constitutional source of decision has not been delineated by the Supreme Court of Virginia with sufficient clarity to say that either the Federal or the State Constitution is the exclusive source of decision. Although a dispassionate reading of the decisions below supports the view that they are based on the Federal Constitution, even if the decisions are based on both Constitutions, *certiorari* is warranted. The observa-

tions of this Court in *Minnesota* v. *National Tea Co.*, 309 U.S. 551 (1930), as to whether *certiorari* should be granted when it is unclear whether the state court decision below rests on state or federal constitutional grounds support *certiorari* in these circumstances.

In the *National Tea* case, the state supreme court set aside a gross sales tax as unconstitutional, mentioning both the Equal Protection Clause of the Fourteenth Amendment and a provision of the state constitution as well.

This Court, per Justice Douglas, described the problem as follows:

> Respondents contend that the court held the statute invalid for violation not only of the Federal Constitution but also of the State constitution. Hence, they seek to invoke the familiar rule that where a judgment of a state court rests on two grounds, one involving a federal question and the other not, this Court will not take jurisdiction. *Id.*, 309 U.S. at 554.

In this passage, the Court is referring to the doctrine that if the state court decision is supported by an adequate and independent state ground the Supreme Court will not take jurisdiction to decide the federal question. However, this Court in the *National Tea* case was very careful to say that the possibility that the decision below was based on a state ground by no means necessarily excludes review of the state decision:

> Enough has been said to demonstrate that there is considerable uncertainty as to the precise grounds for the decision. . . .
>
> * * *

> But that does not mean that we should dismiss the petition. *Id.*, 309 U.S. at 555.

The Court then stated that it had in a number of situations, among them ". . . where the grounds of the state decision were obscure," vacated the judgment below and remanded the cause ". . . so that the federal question might be dissected out or the state and federal questions clearly separated." *Id.*, 309 U.S. at 555-56.

In *National Tea*, the Court described the need for *certiorari* in circumstances such as those presented by the instant petition in language which very nearly describes the present situation:

> It is important that this Court not indulge in needless dissertations on constitutional law. It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. *But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the Federal Constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases.* Only then can we ascertain whether or not our jurisdiction to review should be invoked. Only by that procedure can the responsibility for striking down or upholding state legislation be fairly placed. *For no other course assures that important federal issues, such as have been argued here, will reach this Court for adjudication; that state courts will not be the final arbiters of important issues under the Federal Constitution;* and that we will not encroach on the constitutional jurisdiction of the states. This is not a mere technical rule nor a rule for our convenience. It touches the division of authority between state courts and this Court and is of equal importance

to each. Only by such explicitness can the highest courts of the states and this Court keep within the bounds of their respective jurisdictions. *Id.*, 309 U.S. at 557 (emphasis added).

A scholar has recently offered some perceptive observation on the desirability of Supreme Court appellate review in circumstances such as these:

> Cases may arise in which a statement by the Court on the federal issues presented would serve a useful purpose. Perhaps the most frequently recurring of the situations in which an assertion of such power by the Court would be useful is that in which the state court has invalidated a statute under both state and federal constitutions. Although the state ground in that situation is, technically, both "independent" and "adequate," *the frequency with which state courts, in interpreting state constitutions, rely on federal decisions construing a similar provision in the federal constitution suggests that the Court ought not to be blind to the leadership that it in fact exerts in this area.* Even when it does not seem likely that the judgment in the case at bar will be affected, thought must be given also to the *potential impact in other cases* and the desirability of assuring that "the responsibility for striking down or upholding state legislation be fairly placed." In such cases, there is no overriding policy that requires the Court to stay its hand. The independence of state courts would not be sacrificed since the judgment would be undisturbed. Moreover, the record before the Court will normally be fully adequate to illumine the issues and the Court will frequently have the benefit of adversary proceedings, thus removing the primary objections to "advisory opinions." Sandalow, *Henry* v. *Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 Sup. Ct. Rev. 187, 201-202. (emphasis supplied).

What is noteworthy about Professor Sandalow's comments is that he calls for the grant of *certiorari* even if the decision below rests entirely on state constitutional grounds where such a ground parallels a similar provision in the Federal Constitution and where in such circumstances this Court exercises leadership.[38]

Furthermore, it should be noted that *Euclid* itself, although it arose in the federal courts and thus came to this court through a different jurisdictional route, had the same parallelling of the issues in that the lower court decision was based both on the state and federal constitutions. The Court nevertheless discussed the matter as if it arose solely under the Federal Constitution:

> The ordinance is assailed on the grounds that it is in derogation of § 1 of the Fourteenth Amendment to the Federal Constitution in that it deprives appellee of liberty and property without due process of law and denies it the equal protection of the law, and that it offends against certain provisions

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[38] The Supreme Court of Virginia has acknowledged its deference to this Court in the area in question.

> It is a settled rule of the Supreme Court of the United States, if the question of reasonableness is fairly debatable to hold that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of deciding the question. *Zahn* v. *Board of Public Works, supra,* 274 U.S. 325 (1927).
>
> We are, therefore, of opinion to sustain the ordinance under review as constitutional. In this we simply agree with and follow the Supreme Court of the United States, the final arbiter of such questions. *Martin* v. *City of Danville,* 138 S.E. 629, 630 (Va. 1927).

See also McIntosh v. *Commonwealth,* 191 S.E.2d 791, 794 (Va. 1972)—". . . does not offend the provisions of the Fourteenth Amendment to the Constitution or the *cognate* provisions of the Constitution of Virginia." (emphasis added.)

> of the Constitution of the State of Ohio. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 384 (1926).
>
> * * *
>
> It is not necessary to set forth the provisions of the Ohio Constitution which are thought to be infringed. The question is the same under both constitutions, namely, as stated by appellee: Is the ordinance invalid in that it violates the constitutional protection "to the right of property in the appellee by attempted regulations under the guise of the police power, which are unreasonable and confiscatory?" *Id.*, at 386.

For the foregoing reasons, the petitioner submits that the grounds of decision in the opinions below are fundamentally rooted in federal constitutional law and *certiorari* should be granted so that the court may review the correctness of the application of those principles.

IV. THE EFFECTS OF THE ALLMAN AND WILLIAMS OPINIONS.

A. Effects In Fairfax County And In Virginia

Implicit, but unstated, in both of these decisions is the fact that the courts have determined that public facilities will be available at some relatively specific time in the future for specific properties.

The actions required by the court will allow the development of incrementally more dwelling units than the present zoning district permits. As can be discerned also from both opinions, there is a distinct difference of opinion over whether public facilities in these areas of the County are adequate.

In the *Allman* decision, 211 S.E.2d at 51, the Supreme Court of Virginia found:

> There was evidence before the lower court from which it reasonably could have found that at the

> time the Board considered the Allman application the necessary public facilities were either available or *would become available by the time the project had been developed.* (emphasis added)

In the *Williams* decision, 216 S.E.2d at 39-40, there was similar language:

> As previously noted, the trial court made four important findings: (1) public facilities were or *soon would be available* to serve the land in question, . . . (emphasis added).
>
> We are of the opinion that the record supports each and every one of these findings of the trial court.

The courts below have found this in the face of determinations by the legislative body that public facilities are not presently adequate and will not be adequate in the near future to support the type of development proposed. Such determinations by the courts might be appropriate if the courts were acting in a representative capacity for all the people within the jurisdiction, or if the courts had the power to tax and appropriate funds for needed facilities. However, it is the legislative body's duty and function to determine, based on the health, safety, and general welfare of the entire community, *Berman* v. *Parker,* 348 U.S. 26 (1954), where public facilities are to go. The court here has usurped an additional set of legislative functions and has done so within the very limited confines of litigation between a single property owner and the County Board.

The court's decisions will allow the developers in the cases at bar to develop at the densities they desire. This will force the legislature to legislatively react—*i.e.,* to provide public facilities/public services for the

people who soon inhabit these developments. The concept of planning for future development, whether residential units or public facilities, is no longer a viable one in Virginia. The local legislature can only react to the private developer—wherever and whenever he elects to build, the locality must provide his development with facilities sufficient for the inhabitants generated thereby.[39]

The County Board must, through such police power as remains after *Allman* and *Williams,* make some provision for public facilities to accomodate this new development and do so in a manner which avoids depriving those who are presently sharing existing inadequate facilities.

In addition to this effect, the directions of the court in remanding and directing certain actions constitutes a direct invasion of the police power of the state. The federal courts have refused to take such a step.

> [T]his court may not, without an unwarranted invasion of the police power of the city, an arm of the state, substitute its judgment for that of the city council. *Downham* v. *City Council of Alexandria,* 58 F.2d 784, 788 (E.D. Va. 1932).

The instructions of the Supreme Court of Virginia to the trial courts are explicit in the results which they require. Both orders are nearly identical, with only

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[39] Such a requirement could prevent compliance with the mandates of the Federal Water Pollution Control Act amendments of 1972, 33 U.S.C. § 1251 *et seq.*, and the Clean Air Act of 1970, 42 U.S.C. § 1857 *et seq.* Both of these pieces of legislation require planning—looking to future development areas and needs.

minor variations in language. *Allman,* 211 S.E.2d at 55-56; *Williams,* 216 S.E.2d at 41-42.

The Board of Supervisors, prior to taking the required action, must afford notice and the opportunity for a hearing to all those who will or may be affected. Fifth and Fourteenth Amendments to the United States Constitution; *Va. Code Ann.* § 15.1-431. *Appendix, infra* p. 85.

However, the requirement that the trial court enjoin the Board from taking any action which would disallow the use of PDH-3 or R-12.5 by Allman is a direct and improper invasion of the police power. The court is directing the legislative body to take action "a" or action "b", when the legislative body would ordinarily have any number of reasonable options.[40]

The effect of the court taking such action—directing the enactment of specific legislation—is to deprive citizens of Fairfax County of their rights to due process and equal protection of the laws. Those very people whose rights may be directly affected—those with children in overcrowded classrooms which will have to accommodate even more children; those with inadequate fire services who will have to share an increased inadequacy with persons populating the Allman property—have no longer a right or ability to affect those decisions.[41]

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[40] This presents no finality problem because only the legislature may perform a legislative act.

[41] If an interested citizen testifies or otherwise submits evidence against a higher density for the Allman and Williams properties at the new hearings ordered by the court, this evidence can have no effect because the legislature's marching orders are clear. These hearings may well be a sham. Adjoining or nearby property owners to the Allman property were able to testify at the original

The court's ruling will result in one of two possible sequences of events. The Board of Supervisors, acting under court order, may schedule appropriate hearings, receive testimony, and act within the parameters of the court's order—parameters so narrow as to leave the Board virtually no discretion, thus making a sham of the notice and hearing process. Alternatively, the Board may defy the court's order and allow the trial court to enter further orders of such a nature as to bring about the situation which the appellate court had directed. In effect, the courts will have legislated, without any notice or hearing, in derogation of the rights of those who have a direct interest in the ultimate development permitted on the property in question.

This directive of the court, if exercised, both usurps the police power of the Board by judicial legislation and precludes the possibility of any relief for neighboring property owners even though they have been denied due process.

B. Effects Nationwide

In the cases presented, the issue of the locality's power to zone was not raised, that question having been decided previously by the Supreme Court of Virginia. *West Bros. Brick Co.* v. *City of Alexandria*, 192 S.E. 881 (Va. 1937), *appeal dismissed*, 302 U.S. 658 (1937),

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hearing in October, 1971, but to have full constitutional and statutory notice, these owners near the Allman property would have had to know that they must testify at the Clinch hearing (one mile away) to have protected their legal rights. The Clinch mistake mandated the Allman rezoning. The domino theory created by the courts below makes it impossible for citizens to participate effectively. How can a property owner who lives near the third domino know that he must react even though that domino may be two-and-a-half miles away (Reston) or in another county (Sterling Park). The decision below necessarily violates the due process notice requirements of other landowners.

rehearing denied, 302 U.S. 781 (1938). Further, neither Mr. Allman nor Mr. Williams raised the issue of whether the Board had considered the proper matters prior to making its determination. Rather, they complained of the result reached by the Board, after the Board had considered proper matters. The implications of the court's actions become very significant when viewed in this light.

The *Standard Zoning Enabling Act* was prepared by the U.S. Department of Commerce in 1922. This legislation has been adopted in Virginia and although modified and amended several times, is very similar to the zoning enabling legislation in nearly every other state. As noted by Professor Norman Williams, in his recent volumes of *American Land Planning Law:*

> For the purpose of this work, by far the most important of these is the Standard Zoning Enabling Act, adopted at one point in all 50 states, and still in effect (with various modifications) in 47 states. This is a remarkable phenomenon in the field of public law—that all the states should have essentially the same enabling legislation. N. Williams, 1 *American Land Planning Law* § 18.01 (1974).[42]

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[42] The SZEA [Standard Zoning Enabling Act] and SPEA [Standard Planning Enabling Act] were based on two important assumptions: (1) the "owner" of land (private person or governmental agency) has the power to use or develop his land as he wishes except as specifically restricted in state and local legislation; (2) The public interest of the state lies in *authorizing* local government to control the development decisions of an owner of land within the borders of the local government.

• • •

The purposes for which the local government could act under the SPEA and SZEA were the full inventory of constitutionally permissible purposes—promotion of health, safety, morals, and general welfare—but the purely local public interest was dominant. American Law Institute, *A Model Land Development Code,* "Proposed Official Draft No. 1," p. 2 (1974).

The statutory purposes of zoning ordinances in the *Standard Act* were:

> designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. *Id.*, at 363.

See Va. Code Ann. § 15.1-489, *Appendix, infra*, p. 89.

The decisions of the Supreme Court of Virginia, whether followed or not, can be argued as precedent by landowners in nearly every state. The net effect of these cases could be to return the United States to the uncontrolled situation that existed prior to the approval of zoning by this Court in *Euclid, supra*.[43]

The inability of a locality to discriminate between properties will mean logically that all properties must be placed in identical zoning categories. As noted by the City of Charlottesville, in its *amicus* brief seeking a rehearing of the *Allman* decision:

> The obvious inference from these findings is that in its drawing of zoning lines the legislative body may not assign properties to different zoning categories within the same general neighborhood. Of course, the precise area comprising a neighborhood is not defined, but by inference it may extend at least 2.5 miles. Opinion, *supra*, at

[43] Another possible effect would be for local jurisdictions to limit their planning to densities that are considered acceptable in the short range, thus precluding the possibility of long-range potential being used against the locality to establish "unreasonableness." This would, of course, defeat most of the purposes of long-range comprehensive planning.

> 10-12. Little or no consideration appears to have been given to the differing factors that may have influenced the Board's varying decisions within their "neighborhood" and over the course of its development during fifteen years. Moreover, every parcel of land in the county is in close proximity to some other parcel. Logically extended, the rationale applied by the Court in *Allman* would create a "domino" reaction ultimately resulting in a single uniform zoning classification throughout the entire county. *Allman*, Brief Amicus Curiae of the City of Charlottesville, In Support of Appellants' Petition for Rehearing, p. 8.

The basic concept of zoning—that certain types of uses should be separated from other types of uses—would no longer have any validity. The domino effect, an explicit concern of the California and Maryland courts, has become a reality in Virginia. In *Wilkins* v. *City of San Bernadino*, 175 P.2d 542, 549 (Cal. 1946), the court stated:

> Often there may be little differences in the character of the property on either side of the zoning line, but such a showing will not justify a judicial alteration or extension of the boundaries. If an owner could compel the extension of the "island" by any such showing, then the next adjoining owner in turn could likewise make the same kind of showing and obtain another extension of the island to his property and in short time *there would be an end to the effectiveness of all zoning legislation.* (Emphasis added.)

See also, Montgomery County Council v. *Shiental*, 238 A.2d 912 (Md. 1968). Under the legal theory of the court below, zoning would cease to be a legislative decision. It would merely be a reactive legislative function dictated by long-preceding legislative decisions.

The second basic concept subordinated by the Supreme Court of Virginia is that which allows localities to take affirmative action to provide for the public health, safety, and general welfare. Virginia localities are now relegated to taking those defensive actions which are necessary to protect the health, safety and general welfare. The distinction is crucial since in the former, a locality is given a presumption of propriety —that where beneficial results are intended, a local action will be sustained unless there is a violation of Constitutional rights. In the latter, the locality must be able to justify its every action and establish the reasonableness of the action in relation to specific aspects of health, safety, and general welfare. The latter burden, placed on any state legislative body, clearly infringes on both the police power and on the doctrine of separation of powers. The legislative branch can no longer function to perform its duties imposed under both federal and state law.

CONCLUSION

It is submitted that the Supreme Court of Virginia erred in holding that the refusals to grant the rezoning classifications in *Williams* and *Allman* violated the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Two respected commentators on the jurisdiction of this Court have specified as an appropriate ground for the exercise of the discretionary *certiorari* jurisdiction, the following category of cases:

> *Where a state court* has decided a substantial and unsettled federal question arising under the Constitution or where it *has rendered an errone-*

ous or at least a doubtful decision on such a question, the Supreme Court frequently grants the petition for a writ of certiorari despite the absence of a conflict. (emphasis added.) Stern and Gressman, *Supreme Court Practice* 193, (4th ed. 1969).

For the reasons detailed above, Petitioner contends that in the light of the consistent interpretation afforded by this Court to Fourteenth Amendment-based challenges to state zoning decisions from *Euclid* to *Belle Terre,* the decisions below disclose an erroneous decision on substantial federal constitutional questions.

For the reasons set forth herein, this Petition for a Writ of Certiorari should be granted.

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to
Petition for Writ of Certiorari

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SUPREME COURT OF VIRGINIA

215 Va. 434

BOARD OF SUPERVISORS OF FAIRFAX COUNTY

v.

ROY G. ALLMAN, TRUSTEE, ET AL.

Record Nos. 7300991 and 740029

SUPREME COURT OF VIRGINIA

January 20, 1975.

Frederick Lee Ruck, County Atty. (George A. Symanski, Jr., Asst. County Atty., on brief), for appellant.

John T. Hazel, Jr., Fairfax (Francis A. McDermott, Hazel, Beckhorn & Hanes, Fairfax, on brief), for appellees.

Before I'ANSON, C. J., and CARRICO, HARRISON, COCHRAN, HARMAN, POFF and COMPTON, J. J.

HARRISON, *Justice.*

Roy G. Allman, James H. Swart, Mary F. Swart, William L. Bryant, Frederick A. Babson, Jr., M. Seth Horne and William B. Ingersoll, Sr., hereinafter called Allman, filed their zoning application C-222 with the appropriate officials of Fairfax County, Virginia, requesting that a tract of land in the County containing 302.96 acres, more or less, be rezoned from the existing RE-1 zoning category (which permits one single-family dwelling per acre) to the PDH-3 zoning category (which permits a minimum of three planned development dwelling units per acre). The existing RE-1 zoning permitted 273 single-family homes on the subject property. Allman proposed 988 units under the PDH-3 category.

The Planning Commission of Faixfax failed by a tie vote to recommend either denial or approval of Allman's appli-

cation and, accordingly, it was forwarded to the Board of Supervisors of Fairfax County, hereinafter called the Board, without recommendation of the Planning Commission. The Board declined to amend its zoning ordinance, by a vote of five to three, and denied the application.

Thereafter Allman filed a motion for a declaratory judgment in the court below, alleging, among other things, that the action of the Board in refusing to rezone his land and in denying his application was illegal, arbitrary, capricious, unlawful and without substantial relation to the public health, safety or general welfare. Following an extensive hearing, the trial court held that the Board's failure to amend was unlawful and entered an order on July 23, 1973, directing that the Board, on or before September 11, 1973, reconsider its action. At this stage of the proceeding the Board deliberated and, disagreeing with the decision of the trial court, filed its notice of appeal and assignments of error on August 21, 1973, and its petition for appeal with this court on November 23, 1973.

The Board failed to reconsider the rezoning application as directed by the lower court, and Allman petitioned the court for further relief. On November 15, 1973, the court below ordered "that the subject property be and it hereby is, rezoned to the PDH-3 District, and Defendant Board is directed to cause its agents to make appropriate notations upon the zoning records of Fairfax County in accord with this Order." The implementation of the order was stayed pending appeal and final disposition thereof. The Board duly filed its notice of appeal and assignments of error.

Allman filed a motion to dismiss the Board's petition for appeal of the order entered July 23, 1973 upon the ground that it was not a final order. The Board's position is that this order adjudicated the principles of the cause and was appealable. In view of the stay granted by the court on November 15, 1973, and the status of the records before this court, it is unnecessary for us to consider the motion.

The dispositive issues here are whether the Board's refusal to rezone Allman's land was without substantial relation to the public health, safety and general welfare, and whether the trial court exceeded its authority in rezoning the property.

The Allman property is located in the western portion of Fairfax County immediately adjacent to the Loudoun County boundary line. The land lies on both sides of Highway # 228, about one-half mile south of its intersection with Route 7. Highway # 604 is contiguous and one of its northern boundaries. Sugerland Run is an eastern boundary. The Hiddenbrook Subdivision is on the south. To the west and across the county line in Loudoun is the residue of the Allman property, 100 acres, which has Highway # 625 as one of its northern boundaries. The property is approximately ½ mile north of the Town of Herndon and 2.5 miles northwest of Reston.

This court is not a stranger to the problems attending the phenomenal growth of Fairfax County in recent years. We have considered numerous cases detailing the efforts of the governing body of the County to cope with these problems. The original pressures emanated from Washington, D.C., and therefore the eastern portion of the County developed first and more rapidly than its western portion. In 1956 the Board endeavored to restrict development in the western two-thirds of Fairfax by zoning the area for one and two acre lots. Its rationale was that public facilities in the developed eastern one-third required prior attention. This policy of restrictive large lot zoning was disapproved by us in Board of Suprvisors v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959). Reston, described as an innovative concept in planned residential communities, was formed in 1962. At about the same time the Town of Herndon, designated as a rural community-commercial center, began its growth.

In 1963 the County adopted the Western County Development Plan which anticipated suburban clusters around Reston, Herndon, Sugarland Run, and other areas near the Allman property. This plan envisioned developments at densities of approximately 2.5 units per acre. During the 1960's the County was divided into planning districts. The Allman property is located in the Upper Potomac Planning District, which contains 43,699 acres and includes Reston and Herndon. The Upper Potomac Plan is a detailed comprehensive land use plan, also referred to as the Master Plan, and was adopted by the Board in 1970. It provides for a suburban density cluster of 2.5 units per acre along Route 228 between Herndon and Route 7, and this cluster includes the Allman property. In effect it continued the cluster concept of the Western County Development Plan.

It is conceded that the density and use requested by Allman is a reasonable use of his property. Rosser H. Payne, a professional planner, and former employee of Fairfax County for 17 years, testified that it would be an error and a complete reversal of County policy to retain this property in the RE-1 category. Payne also said that there were public facilities sufficient to support the Allman application in every respect and that the application "is in full accord with everything that has been written by the county with regard to this Western County Upper Potomac Planning District Plan, both in the original plan and the revised edition."

The evidence further shows that while the Allman property could be developed without loss if it remained in the RE-1 category, its value, as of the time of trial, if zoned R-12.5 or PDH-3 (either category being acceptable to Allman) was approximately $2,467,000 greater than if it remained in the RE-1 category. It was clearly established that the property is suitable for a more valuable use than RE-1, and that the County has consistently planned a more valuable use for it.

It is also conceded that a critical housing need for low and moderate income families exists in the County. This need was noted by us in Fairfax County v. DeGroff, 214 Va. 235, 236, 198 S.E.2d 600, 601 (1973). The evidence in that case was such that Mr. Justice Harman was prompted to state: "The hearing before the trial court clearly demonstrated both a demand and an urgent need for housing units for low and moderate income families in Fairfax County. Indeed, the uncontroverted evidence indicates that the need then existed there for 10,500 such dwelling units." It was estimated by a witness that of the land available in the Upper Potomac Planning District for development an overwhelming percentage is zoned to require one acre or more per dwelling unit, and that this results in the vast majority of housing being built for those enjoying a high income bracket.

While the witnesses introduced by Allman testified that, by and large, adequate public facilities were available or would become available as the project developed, the witnesses for the Board stressed the present inadequacy of all public facilities in the area.

Route # 228 is a Virginia state primary highway from Herndon north to Route 7. Mr. J. D. Pammel, Director of the Board's Division of Zoning Administration, testified that this road had a high priority for future improvement and had been designated as a four-lane, depressed median, divided highway in the state primary system. Presently it is a two-lane primary road carrying approximately 22% of its capacity. It has been noted that the Loudoun County portion of the Allman property adjoins Virginia State Highway # 625 on the north. In addition, Sugarland Road (Route 604) adjoins the property on the west. The developer would provide the necessary roads, sidewalks, streets and alleys within the development at his own cost.

Water supply for the property would come from the same source that presently serves Reston and Herndon,

that being the Goose Creek system of Fairfax City. It does not appear from the evidence that there is any shortage of water or that there should be any problem in providing the development with an adequate water supply.

The evidence of the Board was that the schools were not adequate to take care of the increase in school population that would be generated by the development. However, Mr. Thomas Whitworth, an official of the Fairfax County school system, testified that this increase was in accord with the numbers anticipated in the County's comprehensive plan and that it would be accommodated. Apparently this accommodation would occur in the same manner the County has accommodated the steady increase in school population in other sections of the County. This could be done, Whitworth testified, by an accelerated building program, temporary classrooms, extending the school day, going on a double shift, realignment of school district lines and transporting children from congested areas to areas where there were vacant or unfilled classrooms.

Fire service for the development would be provided by the Herndon Station located 2 miles from the property. The Board's witness, George H. Alexander, Director of Fire and Rescue Service for the County, said the manpower-response distance did not meet the American Insurance Association criteria for the lowest rates. However, he testified the availability of fire and rescue service was not critical. Obviously the fire and rescue services that would be provided Allman would be roughly the same as that provided numerous other areas in the County.

Library facilities serving this area of the County are located in the Town of Herndon and in Reston.

A major trunk sewer system owned and operated by Fairfax County runs through the Allman property. It is this system that serves a part of Reston and the Town of Herndon. Treatment for the system is provided by the

District of Columbia at the Blue Plains Treatment Plant. At the time Allman filed his application for rezoning there were no restrictions on treatment capacity at the Blue Plains Plant. An allocation system now exists throughout this treatment area to provide orderly sewer capacity distribution until additional treatment facilities become available. The Allman propery would be in the same position regarding sanitary sewer capacity as Reston and the Tyson's Corner area. Mr. Jack Liedl, acting director of the Department of Public Works of Fairfax County, testified that the lines located on the Allman property were adequate for the proposed use and that trunk sewer capacity was available. It is noted that the sewer line in question was once a part of Sanitary District 14 which was established to provide sewer service for the Town of Herndon and the area of the County in which the Allman property is located.

There was evidence before the lower court from which it reasonably could have found that at the time the Board considered the Allman application the necessary public facilities were either available or would become available by the time the project had been developed. The Board had no policy that all necessary public facilities be provided in advance of high density zoning. As a practical matter, and because of the ever-existing problem of finance, the construction and installation of necessary public facilities usually follow property development and the demand by people for services. At the time Allman's application was denied by the Board one of its members, addressing himself to it, said:

> "Supervisor Majer: Mr. Chairman, I'm concerned about this. I've heard it said repeatedly that public facilities are not available there. Well, the sewer is available and many of the other public facilities are available. Without people living out there the County is not going to build schools. Without people to drive on the roads, the Highway Department of the State of Virginia is not going to build highways. We know

> from past experience that the improvements to the highway facilities follow the development, and as long as there are roads in the developed areas of this County that need improvement, the Highway Department is not going out into the country and build new four lane roads. We've been hollering about them doing that down in Southside, Virginia, for years. I just think it's . . . When we say it's premature with no public facilities, nobody has ever come up yet and said what is the right time? When will the public facilities be there? Do we put the public facilities in and then zone it? No. We never have and we are never going to."

We conclude from the record and the accompanying exhibits that the Board denied the Allman application primarily because of its timing, rather than because of its impact on public facilities. Several members of the Board observed that the application was premature. The trial court made no reference to public facilities in its opinion or orders. It found that the zoning and density sought by Allman was permitted under the County's applicable comprehensive land use plan; that category PDH-3 does not differ substantially in impact and substance from a R-12.5 district; and that Allman, although entitled to equal treatment in the consideration of his application, had been subjected to discrimination, had not been accorded the same treatment as other applicants for rezoning, and had been deprived of substantial property rights. It held that the denial of Allman's application for a higher density zoning was not reasonably related to the public health, safety and welfare and was arbitrary and capricious.

The Board apparently looks with favor upon the planned unit development and prefers it to the standard, conventional subdivision. While there is no great difference in category R-12.5 and the PDH-3 category, it is the policy of the County to encourage PDH-3.[1] Evidence of this fact

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[1] However, we observe here, as we did in Fairfax County v. Lukinson, 214 Va. 239, 198 S.E.2d 603 (1973), the question of the

is its admitted encouragement of the establishment and growth of Reston, described as a "new town," completely different from any other type of development. With the exception of size, a PHD-3 development differs little in concept from Reston.

This was the background of the Allman application. He was seeking a higher density use of his property and proposed a development he believed would accord with the philosophy and planning of the Board. He sought the density permitted by the County's comprehensive or Master Plan. We note here that a comprehensive or master plan does not have the status of a zoning ordinance. It is advisory only and serves as a guide to a zoning body.

The Allman tract is not located in an isolated area of the County. Its southern boundary is approximately one-half mile from the northern boundary of the Town of Herndon. A major community shopping center is on a site 2,500 feet to the north. Lying immediately between the Allman tract and the Town of Herndon is the Hiddenbrook Subdivision zoned R-12.5 by the Board in 1960, 1965 and 1966. To the northwest of Allman lies Sterling Park, a subdivision in Loudoun County with a density of up to 4 dwelling units per acre. To the south of Allman and on the east side of Route 228 is situated the Herndon High School. A mile east of the Allman tract is the Clinch property containing 64 acres, zoned R-12.5. Reston lies approximately 2.5 miles southeast of Allman.

On the question of the impact on the public facilities of Fairfax by rezoning of Allman from RE-1 to a greater density it will be noted that Reston consists of over 7,000 acres, having a present population in the neighborhood of 25,000 and a planned population of between 72,000 and 78,000. It is in the same area as Allman and is serviced by

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validity of PDH zoning is not before us and we express no opinion thereon.

the same public facilities. Mr. Pammel testified that it was the policy of Fairfax County to promote Reston where it had planned for growth to occur. He further said: "[W]hat we're trying to say in this whole arena of development, that growth should take place properly within Reston. That is, it was planned for in Reston. It's a new town, and in the longer range, these other areas on the periphery of Reston and Herndon should develop." The obvious inference is that Allman and other property owners zoned RE-1 should await the full development of Reston before seeking a rezoning, even though the proposed zoning is in accordance with the County's Master Plan.

As evidence of the preferred status accorded Reston, Allman's counsel, in his brief and at the bar of this court, said that during the time his client's application for rezoning had been under consideration Reston has had two applications for rezoning approved. These applications involved 625 acres, 2,575 units and will generate approximately 2,000 students to impact the same schools, roads and public facilities that the Board objects to being impacted by the Allman development. The Reston tracts were rezoned to an approximate density of 4 units per acre. The adjoining Hiddenbrook development consists of 151 acres, and its R-12.5 zoning permits approximately 2.69 lots per acre.

But even more significant than the high density granted in the areas of Hiddenbrook, Herndon, Sterling Park and Reston, which either adjoin or are in close proximity to Allman, is the action of the Board taken on the application of the Clinch Corporation for a rezoning of its land. This corporation owned 64.85 acres of land located on the west side of Route # 680, east of the Herndon High School and approximately one mile east of Allman. The tract had also been zoned RE-1. The Clinch application was filed in April, 1971. Allman's application for rezoning was denied by the Board in October, 1971. The Clinch application was granted

in December, 1971, and its zoning category was changed from RE-1 to R-12.5. Both the staff and the planning commission recommended that the application be granted. Mr. Pammel admitted that the Clinch development involved the same problems for the County as did Allman's development. In fact Pammel said that a planned unit development such as Allman proposed is more favorable to the County in terms of cost benefit analysis than a standard conventional subdivision such as Clinch.

Other than the difference in size of the two tracts, the Board's only explanation as to why two months after refusing Allman the Board rezoned Clinch is that it made a mistake. We find nothing in the record to indicate that the Clinch rezoning to a greater density did not represent the considered and best judgment of the Board, the staff and the planning commission. Subsequently an effort was made by the Board to rezone the Clinch property from R-12.5 back to RE-1. This effort was unsuccessful, the court holding that the alleged mistake was not of such significance as to merit a change in zoning, and further noting that the staff had recommended a greater density than RE-1. The trial court also found as a fact that the evidence did not support such an impact upon sewer and school facilities as to merit a change from R-12.5 back to RE-1.

The Board has not contented itself with encouraging and promoting Reston's growth, as has been its policy. It has denied a request by Allman for a greater density use of his land, notwithstanding both prior and subsequent to such denial it granted a greater density use to others owning property adjoining or near the Allman land. The evidence introduced, and the argument advanced by the Board, that the County's public facilities would be unduly impacted by the Allman rezoning was countered, not only by testimony of witnesses, but negated by a showing of the Board's other rezonings which had the same, or even greater, impact than would have resulted from the Allman development.

In the instant case we are not dealing directly with a comprehensive zoning ordinance. Rather we are dealing with the legislative action of a Board of Supervisors in refusing to increase the permissible development density of certain property to the category established by a duly adopted comprehensive or master land use plan. The effect of the action of the Board was to reaffirm the zoning of the Allman land in the RE-1 category. This was a legislative act performed by a legislative body.

The general principles which control our decision have been well and often stated. In County of Fairfax v. Parker, 186 Va. 675, 680-681, 44 S.E.2d 9, 11-12 (1947), we held:

> "The benefits of proper zoning laws are everywhere recognized. We need not stop to detail them. Neither is it necessary that we restate the principles governing the validity of such laws. Suffice it to say that if reasonable they are construed to be a lawful exercise of the State's police power. If their reasonableness is fairly debatable, the legislative judgment stands. For a discussion of the underlying principles see Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016; West Bros. Brick Co. v. City of Alexandria, 169 Va. 271, 192 S.E. 881. . . ."

In Board of Supervisors v. Carper, 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959), the court said:

> "The general principles applicable to a judicial review of the validity of zoning ordinances are well settled. The legislative branch of a local government in the exercise of its police power has wide discretion in the enactment and amendment of zoning ordinances. Its action is presumed to be valid so long as it is not unreasonable and arbitrary. The burden of proof is on him who assails it to prove that it is clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relation to the public health, safety, morals, or general welfare. The court will not substitute its judgment for that of a legislative body, and if the reasonableness of a zoning ordinance is

fairly debatable it must be sustained. Board of County Supervisors of Fairfax County v. Davis, 200 Va. 316, 322, 106 S.E.2d 152, 157; West Bros. Brick Co. v. City of Alexandria, 169 Va. 271, 288, 192 S.E. 881, 888 (appeal dismissed, 302 U.S. 658, 58 S.Ct. 369, 82 L.Ed. 508, rehearing denied 302 U.S. 781, 58 S.Ct. 480, 82 L.Ed. 603). The exercise of the police power is subject to the constitutional guarantee that no property shall be taken without due process of law and where the police power conflicts with the Constitution the latter is supreme, but courts will not restrain the exercise of such power except when the conflict is clear. West Bros. Brick Co. v. City of Alexandria, *supra* 169 Va. at page 281, 192 S.E. at page 885.

"As stated by the learned trial judge, 'the purpose of zoning is in general two-fold: to preserve the existing character of an area by excluding prejudicial uses, and to provide for the development of the several areas in a manner consistent with the uses for which they are suited. The regulations should be related to the character of the district which they affect; and should be designed to serve the welfare of those who own and occupy land in those districts.' See also I Yokley, Zoning Law and Practice, § 10, pp. 12, 13."

See also Boggs v. Board of Supervisors, 211 Va. 488, 178 S.E.2d 508 (1971), and Fairfax County v. DeGroff, 214 Va. 235, 198 S.E.2d 600 (1973).

In Fairfax County v. Snell Corp., 214 Va. 655, 659, 202 S.E.2d 889, 893 (1974), we quoted from *Carper* and then said:

"Inherent in the presumption of legislative validity stated in *Carper* is a presumption of reasonableness. But, as *Carper* makes plain, the presumption of reasonableness is not absolute. Where presumptive reasonableness is challenged by probative evidence of unreasonableness, the challenge must be met by some evidence of reasonableness. If evidence of reasonableness is sufficient to make the question fairly debatable, the ordinance 'must be sustained'. If not, the evidence defeats the presumption of reasonableness and the ordinance cannot be sustained."

See also Richmond v. Randall and Keith, 215 Va. 506, 211 S.E. 2d 56 (1975), this day decided.

[1, 2] Allman has overcome the presumption of legislative validity that attached to the action of the Board in reaffirming a RE-1 classification for his land. His evidence established a course of action by the Board that was inconsistent and discriminatory. A discriminatory action is an arbitrary and a capricious action, and bears no reasonable or substantial relation to the public health, safety, morals or general welfare. The reasonableness of the Board's action is not fairly debatable, and it will not be sustained.

[3] We now consider the action of the lower court on November 15, 1973, in ordering that the Allman property be rezoned to the PDH-3 district. The position of the Board is that the trial court's order amended the zoning ordinance of Fairfax County and in this respect violates the doctrine of separation of powers. Its position is well taken.

[4, 5] The court's action is at odds with the decisions of this court and with the holdings of a majority of other jurisdictions. The ultimate classification of lands under zoning ordinances involves the exercise of the legislative power and under the doctrine of separation of powers this field shall not be invaded by the courts. The courts may not rezone property to specific categories upon a finding of the invalidity of a zoning ordinance. It is not the province of courts to zone or rezone, thereby substituting their judgment for that of the legislative body. This was our holding in Boggs v. Board of Supervisors, *supra,* where we said.

> "Lastly, plaintiffs ask this court to rezone their land to permit the construction of a four-story office building and concomitant commercial facilities.
>
> "Zoning is properly a legislative function. Under the evidence presented, this court will not substitute its judgment for that of the Board in determining the proper rezoning classification for plaintiffs' land." 211 Va. at 492, 178 S.E.2d at 511:

See also Richmond v. Randall and Keith, *supra*, and cases therein cited; City of El Paso v. McArthur, 473 S.W. 2d 322 (Tex. Civ. App. 1971); Montgomery County v. Shiental, 249 Md. 194, 238 A.2d 912 (1968); Prince George's County v. Farr, 242 Md. 315, 218 A.2d 923 (1966); J. H. S. Homes, Inc. v. County of Broward, 140 So.2d 621 (Fla. App. 1962); Herzog v. City of Pocatello, 83 Idaho 365, 363 P.2d 188 (1961); and Gayland v. Salt Lake County, 11 Utah 2d 307, 358 P.2d 633 (1961).

Accordingly, the judgment of the trial court is affirmed in part and reversed in part. That part of the order entered July 23, 1973, the effect of which was to hold the RE-1 zoning classification void, as applied to the Allman prpoerty, is affirmed. The order of November 15, 1973, which rezoned the Allman property to the PDH-3 district is reversed. The cause is remanded. The court below will direct the Board to reconsider its action refusing to rezone the Allman property, and it will prescribe a reasonable time for the Board to act. During this period of time the court will suspend its adjudication of the invalidity of the classification RE-1. It having been established by the evidence that the uses of the property proposed by Allman are reasonable uses and that either zoning classification PDH-3 or zoning classification R-12.5 would permit such uses, the trial court will also enjoin the Board during the prescribed period from taking any action which would disallow these uses by Allman (appellees). The order of the trial court will further provide that should the Board fail to comply within the time specified, the adjudication of invalidity of zoning classification RE-1 for the property will become operative and the injunction will become permanent, provided that appellee landowners shall not put their property to any use other than those shown by the record to be reasonable.

Affirmed in part; reversed in part; and remanded.

COCHRAN, J., *concurs in result.*

(Caption Omitted in Printing)

Upon a Petition for Rehearing

(June 13, 1975)

On mature consideration of the petition of the appellant to set aside the order entered herein on the 20th day of January, 1975, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,
Teste:
/s/ Illegible
Clerk

(Caption Omitted in Printing)

Order Staying Execution of Judgment

(August 13, 1975)

Upon consideration of the application of the appellant, by counsel, praying for a stay of execution of the decree entered herein on June 13, 1975, in order that it may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court, it is now ordered that the execution and enforcement of the decree of this court in the above-styled case entered on June 13, 1975, be, and the same is hereby, stayed, until the 11th day of September, 1975, on the expiration of which time the same may be enforced unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

A Copy,
Teste:
/s/ Illegible
Clerk

BOARD OF SUPERVISORS OF FAIRFAX COUNTY

v.

THOMAS R. WILLIAMS, ET AL

Record No. 730996.

SUPREME COURT OF VIRGINIA

June 13, 1975

George A. Symanski, Jr., Asst. County Atty. (Frederic Lee Ruck, County Atty., on brief), for appellant.

John T. Hazel, Jr., Fairfax (Francis A. McDermott, Hazel, Beckhorn & Hanes, Fairfax, on brief), for appellees.

Before I'ANSON, C. J., and CARRICO, HARRISON, COCHRAN, HARMAN, POFF and COMPTON, JJ.

CARRICO, *Justice.*

In this zoning case, the trial court declared "unreasonable, arbitrary and capricious" the denial by the Board of Supervisors of Fairfax County of two applications for rezoning filed by the owners of adjoining tracts of land. The Board seeks reversal of the trial court's declaration.

The land in question consists of two undeveloped tracts totaling approximately 418 acres located in the southern portion of Fairfax County. Existing zoning, RE-1, in effect for a number of years, permits development on the basis of one single-family-dwelling unit per acre.

On July 27, 1970, Thomas R. Williams and James L. McIlvaine, owners of one of the tracts, filed an application with the Board for rezoning of their land to R-12.5, a classification which permits up to 2.9 dwelling units per acre. On June 14, 1971, Van Metre Associates, Inc., equitable owner of the second tract, filed an application for similar rezoning. The Board refused to hear the rezoning requests

and was forced by court order to take action on the applications. On November 20, 1972, the Board denied the Williams-McIlvaine application, and on December 18, 1972, it denied the Van Metre application.

The owners of the respective tracts of land then proceeded by way of separate petitions for declaratory judgment to have declared void the Board's denial of the rezoning requests. The two matters were consolidated, and, after a protracted hearing, the trial court, by order entered July 25, 1973, held that the Board's denial of the rezoning applications was unreasonable, arbitrary, and capricious. In its order, the court directed the Board to reconsider the applications within a reasonable time and to rezone the land to a category permitting development at a density higher than permitted under the existing RE-1 classification. The Board took no action on the court's directive, but instead prosecuted this appeal.

In the trial court, the inquiry focused upon two issues; (1) whether certain public facilities, namely, highways, schools, and sewage disposal, were available to serve the land in question, and (2) whether the Board's denial of the rezoning requests was discriminatory. On appeal, the same two issues are paramount.

The Board takes the position that its denial of the rezoning requests was "mandated by state law and deficiencies in public facilities." The state law on planning and zoning, the Board argues, authorizes it to decide "when" public facilities "will be available," requires it to plan the growth of Fairfax County and to provide public facilities "consonant with the efficient and economical use of public funds" (Code § 15.1-427), and demands that its zoning actions protect against "undue density of population in relation to the community facilities existing or available" (Code § 15.1-489).

Public facilities to serve the land in question are inadequate, the Board asserts, and it has determined by an

adopted policy that higher-density development of the area in which the land in question is located "should not occur until public facilities are adequate." Its adopted policy, part of a comprehensive plan for the area in question, reflects an awareness, the Board says, of the greater need for public facilities in other areas of the county where urban densities already exist, in contrast to the area in question where, although there is pressure for urbanization, there does not yet exist the capacity to support development at higher densities. Its adopted policy, the Board maintains, constitutes a rational plan recognizing the inadequacy of existing facilities, which requires that the areas in question develop at one residential unit per acre until "sometime in the future" when provision of additional public facilities "might" warrant "a more intense use of that land." And, the Board concludes, because its decision to deny the present rezoning requests was consistent with the rational scheme of its adopted policy, the denial was not discriminatory.

We have no quarrel with the Board concerning its contention, set forth in the foregoing statement of its position, that in its zoning actions it must protect against "undue density of population in relation to the community facilities existing or available" and must make provision for public facilities "consonant with the efficient and economical use of public funds." The Board's position in this case, however, is at odds, in its essential elements, with the important findings of the trial court. Immediately upon conclusion of the hearing below, the trial judge stated:

> "The Court finds as a matter of fact from the evidence that the public facilities to serve this land are either presently available or will be available in the reasonably foreseeable future.
>
> "The property along the entire eastern boundary of the Van Metre land is presently zoned [for higher density development]. Just to the north of this land are commercial sites plus townhouses, not too many

> hundred feet away from that little tip on the Van Metre land. And also, next to that tip is [property zoned for townhouse development].
>
> "Under these circumstances, the Court is of the opinion that to keep this land in one-acre zoning is unreasonable and arbitrary and capricious."

Thus, the trial court found that (1) public facilities were or soon would be available to serve the land in question, (2) nearby similarly-situated property had already been rezoned for higher-density use, (3) existing zoning of the land in question was unreasonable and therefore invalid, and (4) it was discriminatory and therefore arbitrary and capricious to deny higher-density zoning to the land in question. The crucial question is whether the evidence supports the trial court's findings.

The evidence shows that the land in question is located in the Middle Run subwatershed of the Pohick Creek watershed, in an area of Fairfax County south of the Capital Beltway and west of Interstate Highway No. 95. The Pohick Creek watershed, containing approximately 20,000 acres, consists of three segments: Main Branch containing approximately 11,000 acres, Middle Run containing approximately 2500 acres, and South Run containing approximately 6500 acres.

Because of urban development spreading southwardly from Washington, D. C., the Board in 1964 adopted a sewerage plan for the Pohick watershed as part of the county's integrated sewer system. In 1965, issuance of bonds in the sum of $20 million to implement construction of the integrated system was approved by county voters.

The Pohick sewer plan provided for a sewage treatment plant near the mouth of Pohick Creek and a trunkline serving the Main Branch. The plan provided for no sewerage service in the South Run area and contemplated construction with funds from private developers of a trunkline to serve the Middle Run area. In early 1966, the county

entered into a written contract with two developer-owners whereby the latter agreed to defray the cost, several hundred thousand dollars, to construct a trunkline to serve all the land in the Middle Run area. Under the agreement, the developers were to be reimbursed by the county from assessments imposed upon other property owners using the line. As a result of the agreement, a 15-inch trunkline was constructed to the eastern boundary of the land involved in the present rezoning applications.

On February 14, 1966, the county planning staff submitted to the Board a proposed comprehensive plan for the future development of the Pohick watershed. At the time, much of the land in the watershed was zoned for single-family occupancy on one-acre or larger lots, although substantial areas had recently been rezoned for development on smaller lots. The proposal emphasized that low-density "development does not provide for the efficient and economical provision of public facilities such as streets and highways, effective mass transit facilities, sewer, water, and drainage systems."

The Board adopted the plan on January 18, 1967. The plan provided for residential development in the Main Branch and Middle Run areas on smaller lots, furnishing a population density of 10 persons per acre. Pursuant to the plan, a number of parcels of land were rezoned for higher-density development, including property contiguous to the eastern boundary of the land involved in the present controversy.

In July, 1968, because the 1967 plan had not been interpreted as intended and a "sprawl development pattern was emerging," the Board ordered its planning staff to restudy the Pohick watershed. In January, 1969, the staff submitted its report, recommending that the Main Branch area be declared a "development zone," where development would be encouraged, and that the Middle Run and

South Run areas be declared "holding zones," where development would be postponed.

In discussions on the restudy report, the Board was advised by the county attorney that "the holding zone technique, as propounded, is just not sustainable from a legal standpoint." Supervisor Bowman, the leading advocate on the Board of a policy of "staging or timing" development, acknowledged that the "holding zone concept," without further enabling legislation, was "beyond the realm of authority" of the Board. He pointed out, however, that, although the Board had unsuccessfully sought General Assembly authority "relating to the timing of development,"[1] there were "other tools available" to accomplish the same objective as the "holding zone concept," namely, "the object of inhibiting, or deferring, or restraining development of certain densities." Upon motion of Supervisor Bowman, a resolution was adopted which stated, in part:

> "It shall be the policy of the Board of Supervisors to avoid the presence of a population of urban density in the Middle Run subwatershed until such time as public facilities and services commensurate with such density either shall be available or shall be programmed to be available in the reasonably near future."

On September 10, 1969, the Board adopted the restudy report, with certain modifications, as a comprehensive plan for development of the Pohick watershed. The plan desig-

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[1] This statement concerned efforts during the 1968 and 1969 sessions of the General Assembly to secure the desired legislation. Later, at the 1972 session, Senate Bill No. 95 was offered. The bill was intended to amend Code § 15.1-486 to permit the "timing" by zoning ordinances "of the development of uses otherwise permitted, when public facilities, including utilities, transportation, education, protective and recreational facilities, are not deemed by the governing body to be adequate to support development otherwise permitted in the district." The bill was not enacted into law.

nated the various areas of the watershed as "neighborhoods."[2] The land in question is located in neighborhoods 12 and 13, in which development is contemplated at a rate of up to two dwelling units per acre under conventional development and up to 2.2 dwelling units per acre under cluster development.

In addition to the previously-quoted Board resolution, the Pohick Plan contained statements of policy for future development of the watershed. In the statements, the South Run area was designated a holding zone. No reference, however, was made to a holding zone with respect to the Middle Run area. Instead, the policy statements concerning Middle Run declared:

> "Between now and 1975, land development in the Pohick watershed should be limited to areas in the Main Branch that are north of the Southern Railroad right of way, west of Rolling Road, and in the vicinity of Lorton. Public expenditures for roads and community facilities between now and 1975 should be concentrated in these areas.
>
> "Between 1975 and 1980, land development in the Pohick watershed should be limited to the Main Branch and Middle Run areas. Public expenditures for roads and community facilities should be concentrated in these areas."

A provision of the plan required annual review by the Board to determine whether public agency capacity had become adequate to permit higher-density development in the Middle Run area. Such annual review, however, was not undertaken by the Board.

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[2] The plan describes a "neighborhood" as follows:

> "A neighborhood is devoted primarily to single-family residences and residentially oriented uses—churches, elementary schools, neighborhood parks, and neighborhood shopping centers. A neighborhood normally contains 5,000 people and is bounded by expressways, arterial highways, or other barriers."

At the time the Pohick Restudy Report was adopted in 1969, 850 acres, or 33.5%, of the 2542 acres included in the Middle Run area had already been zoned for higher-density development. Immediately following adoption of the Report, the Board granted two applications for higher-density zoning involving 121 acres in the Middle Run area and, shortly before commencement of the trial of the present case, the Board granted another application for similar zoning involving 64 acres. Consequently, at the time of trial, 1035 acres, or 41%, of the 2542 acres to Middle Run had been rezoned for higher-density development.

As a result of the Board's rezoning actions, the land in question bordered, along the entirety of its more than 7,000-foot eastern boundary, property in the Middle Run area zoned for higher-density development, including townhouse construction. Several hundred feet to the north, although located in the Main Branch area, property is zoned for commercial and higher-density residential use.

As has been noted, adequacy of highways to serve the land in question was one of the concerns in the trial court. There was evidence that the present roads are inadequate to support higher-density development of the land in question. There was other evidence, however, that the road system was being improved and was slated for further improvement. And it was shown that improvement of highway facilities followed, rather than preceded, development of an area.

Adequacy of school facilities was also an item of concern in the trial court, although, on appeal, the Board appears to have lost interest in the point, devoting only the following lines to argument in its opening brief:

> "Schools are also a valid consideration in a zoning decision. *Va. Code Ann.* § 15.1-489. Schools in the area were and will continue to be deficient."

The evidence fails to show, however, any serious deficiency in schools to serve the area. Indeed, the evidence

shows that the previously-rapid increase in the county school population had "leveled off" and there were schools not filled to capacity so located that, with some busing, they could serve the land in question. Although the county had established a policy of attempting to construct elementary schools within walking distance of homes in a neighborhood, it was shown that the policy was an ideal not followed in practice and that more than half the county's school population was bused with the use of some 650 vehicles. A school official asknowledged that the increased number of school children resulting from development at higher density of the land in question could be "absorbed," without "undue burden," into the present system. And, as with highways, it was shown that provision of schools to serve a particular area followed, rather than preceded, development of the area.

[1] Adequacy of sewerage facilities was the other item of concern in the trial court. Although the sewer trunkline constructed with funds provided by private developers is in place at one of the boundaries of the land in question, treatment facilities are not presently available because the plant serving the Pohick watershed has become overloaded and a moratorium has been imposed upon additional connections. Treatment capacity, however, will be doubled upon completion in early 1976 of construction now in progress and the Pohick watershed then will have sufficient capacity available. At the commencement of the hearing below, the owners of the land in question stipulated that if the trial court ruled in their favor they would not use the ruling to demand development of the land "prior to the sewer being available."[3] So the question of the ade-

[3] The Board now complains that the trial court, in accepting the stipulation, improperly permitted the "introduction of new factors into a legislative decision at the time of judicial review." The Board, however, failed to object when the stipulation was offered, and the complaint will not be considered on appeal. Rule 5:7, Rules of Court.

quacy of sewerage facilities became, at most, a mere side issue.

With reference to developability of the land in question, there was testimony that because of its topography and location, it was "far superior" to other property in the Middle Run area. While it conceded that the owners could develop the land under its existing one-acre zoning "and not lose money," an expert appraiser testified that it would "border on [the] ridiculous" to develop under existing zoning. The witness gave as reasons for his opinion: (1) "the character of the community has changed [and] is no longer an RE-1 neighborhood," (2) the comparatively-higher per-unit cost of development under one-acre zoning "makes [higher-density development] extremely feasible and certainly is reasonable," (3) as presently zoned, the land has a value of $1,922,500.00, but if zoned for development at 2.2 dwelling units per acre it would have a value of $4,367,368.00, or a difference of approximately $2,445,-000.00, and (4) "a tremendous shortable of buildable lots" exists in Fairfax County and a developer would not attempt "to go" with one-acre zoning "as opposed to holding and going" to a yield of 2.2 units per acre.

The availability of building sites and the economics of building in Fairfax County were the subjects of comment by a number of witnesses. The expert appraiser, previously mentioned, stated that the shortage of buildable lots had caused an increase in cost of building sites and this was the reason "building costs have gone up so fantastically." One of the owners of the land in question testified that he had "looked from border-to-border in the county for buildable property at an economical basis." A school official opined that because the county had become "a higher-cost place to live," it is almost prohibitive for "a working family with young children to come in."

An expert in urban land economics stated that land in the county is so "zoned and structured," resulting in ex-

pensive development on one-acre or larger sites, that the county "is becoming more and more a place not simply for the affluent but for the fairly rich." Pointing out that only 3.3% of the undeveloped land in the Pohick watershed was zoned for higher-density residential development, the witness stated that this was an insufficient supply of developable land. When he attempted to describe the "whole pattern of large-lot zoning" as "exclusionary," the Board's objection to his use of the word "exclusionary" was sustained. He then said that he could answer "without using that word," and continued:

> "The availability of land in Fairfax County is now such that in the one-acre and up category there is a great deal of land and so the way in which the land is being managed, only those with substantial means can afford to move into the County. People who would, let us say, earn in the $20,000-a-year category, people who would buy houses in the $50,000 category, do not have adequate opportunity, and people under 40 get very thin, and under that you can forget."

[2] As previously noted, the trial court made four important findings: (1) public facilities were or soon would be available to serve the land in question, (2) nearby similarly-situated property had already been rezoned for higher-density use, (3) existing zoning of the land in question was unreasonable and therefore invalid, and (4) it was discriminatory and therefore arbitrary and capricious to deny higher-density zoning to the land in question. We are of opinion that the record supports each and every one of these findings of the trial court.

[3, 4] In reaching this conclusion, we have not overlooked, but have given full credit to, the presumption of validity which accompanies the Board's denial of the rezoning requests in this case. The denial was legislative action, action which is presumed to be reasonable. Although this presumption of reasonableness is not conclusive, it survives until the one who attacks the legislative action,

and upon whom the burden of proof rests, shows clearly that the action is unreasonable. *Board of Supervisors of Fairfax County* v. *Carper,* 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959).

[5] We are concerned, then, with the reasonableness of the Board's action in denying the rezoning requests. This legislative action was reasonable if the matter in issue, *viz.,* the proper zoning classification of the land in question, is fairly debatable. *County of Fairfax* v. *Parker,* 186 Va. 675, 680, 44 S.E.2d 9, 12 (1947). The emphasis here is upon the word "fairly." Given the human tendency to debate any question, an issue may be said to be *fairly* debatable when the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions. The evidence to be sufficient for this purpose must meet not only a quantitative but also a qualitative test; it must be evidence which is not only substantial but relevant and material as well.

In determining whether, in a given case, the presumption of reasonableness of zoning actions prevails or is overcome, we have established these maxims:

> "Where presumptive reasonableness is challenged by probative evidence of unreasonableness, the challenge must be met by some evidence of reasonableness. If evidence of reasonableness is sufficient to make the question fairly debatable, the ordinance 'must be sustained'. If not, the evidence of unreasonableness defeats the presumption of reasonableness and the ordinance cannot be sustained." *Board of Supervisors of Fairfax County* v. *Snell Construction Corp.,* 214 Va. 655, 659, 202 S.E.2d 889, 893 (1974).

In the present case, the evidence presented by the owners of the land in question showed that the existing zoning was unreasonable and that higher-density zoning was reasonable. The landowners' evidence showed that their property was suitable for higher-density development; that the

character of the neighborhood had changed materially from the time the land was placed in its one-acre category and even from the time the Board affirmed that classification in 1969; that there was a need for housing constructed on sites smaller than permitted under the existing one-acre classification; that public facilities were or soon would be available to serve the land; and that the land bordered or was nearby other similarly-situated property alread zoned for higher-density use.

[6] This evidence was sufficient to neutralize the presumption of reasonableness which attached to the Board's denial of the rezoning rquests and to shift to the Board the burden of producing evidence to establish the reasonableness of its zoning action. *City of Richmond* v. *Randall*, 215 Va. 506, 511, 211 S.E.2d 56, 60 (1975). In attempting to carry its burden, the Board relied exclusively upon the Middle Run policies of its 1969 Pohick Creek comprehensive plan, policies which were intended to "avoid" higher-density zoning in the Middle Run area until public facilities "shall be available or shall be programmed to be available in the reasonably near future." The factual underpinning of the Board's reliance failed, of course, with the trial court's finding, supported by the evidence, that "public facilities to serve [the land in question] are either presently available or will be available in the reasonably foreseeable future."

But even more disastrous to the position of the Board is the evidence that, despite its policy of avoiding higher-density development in the Middle Run area, at the very moment of the adoption of the policies there was already rezoned for higher-density development one-third of the land comprising the area which the Board declared should not develop until at least 1975. Immediately following the adoption of the policies, the Board rezoned for higher-density development an additional 121 acres in the same area. And, shortly before commencement of trial of the

present case, the Board granted the preferred higher-density status to another 64 acres in the Middle Run area.

It is true, as the Board points out, that a comprehensive plan, similar to the Pohick plan embodying the Middle Run policies, is merely a guide for development, rather than an instrument of land use control. In this case, however, the Board, relying upon the density provisions, has used its plan as a sword to permit development of some property in the Middle Run area and, relying upon the timing provisions, has used the plan as a shield to justify denial of similar treatment to other property in the same area.

It is also true, as the Board points out, that the fixing of boundary lines of zoning districts is, by nature, more or less arbitrary. In drawing the line between the land in question "and the urban-density zoning to the east and northeast," the Board says, it was merely exercising its legislative discretion. The drawing of such lines, however, must rest upon some rational basis to withstand a charge of unreasonableness. In this case, the line between the land in question and the adjoining property is not the only important line. Equally important are the lines the Board drew around the entire Middle Run area. In drawing those lines, the Board included similarly-situated but dissimilarly-zoned property, added to its dissimilarity in disregard of its own policies, and has offered nothing, save the Middle Run policies themselves, as a basis for distinction.

The effect of the application of the Board's Middle Run policies was to discriminate between similarly-situated property. In the present case, the discrimination was specifically and dramatically directed at the land in question. While hearing and granting other rezoning requests in the Middle Run area, the Board refused even to consider the present requests until forced by court action to hear the applications. But more important, the land in question extensively borders or is nearby other property already

zoned for higher-density use. No demonstrated real difference distinguishes the various properties and justifies granting preferred status to one property while denying it to another. This is the same type discriminatory practice described as arbitrary and capricious and therefore condemned in *Board of Supervisors of Fairfax County* v. *Allman*, 215 Va. 434, 211 S.E.2d 48 (1975).

[7] Another discriminatory effect, although perhaps unintended, of the Board's zoning policies was to elevate the cost of building sites and housing and thus tend to exclude from portions of Fairfax County those persons who do not have the "substantial means" to "afford to move into the County." Zoning action with similar exclusionary effect was held impermissible in *Board of Supervisors of Fairfax County* v. *Carper, supra.*

Under all the circumstances of this case, the reasonableness of the Board's action in denying higher-density zoning to the land in question is not fairly debatable. We affirm the trial court's findings that the existing RE-1 zoning is invalid as applied to the land in question, and that the Board's denial of the rezoning application was arbitrary and capricious. The case will be remanded to the trial court with instructions to enter another order. The new order will suspend the adjudication of invalidity for a prescribed period of time and direct the Board to consider further legislative action. Since the evidence shows that the alternative uses proposed by the owners[4] are reasonable uses, and that either zoning classification R-17 or R-12.5 would permit such uses, the new order will enjoin the Board during the prescribed period from taking any action which would disallow these uses. The new order

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[4] During trial, the landowners expressed a willingness to accept R-17 zoning, an intermediate classification between RE-1 and R-12.5. In its oral opinion, the trial court indicated that its directive to the Board permitted consideration of the R-17 classification. Our remand carries the same indication.

will further provide that should the Board fail to comply within the prescribed period, the adjudication of invalidity will become operative and the injunction will become permanent, provided that the landowners shall not put their property to any uses other than those shown by the record to be reasonable.

Affirmed and remanded.

COCHRAN, J., *dissenting.*

I'ANSON, C. J., *joins in dissent.*

COCHRAN, *Justice (dissenting).*

As the record in this case establishes to my satisfaction that the chancellor erred in ruling that the Board of Supervisors acted unreasonably and invalidly in denying the applications for rezoning from RE-1 classification to a category that would permit higher density use I respectfully dissent.

The two tracts, comprising approximately 418 acres of undeveloped land, lie in the southern part of Fairfax County in what the County has designated as Neighborhoods 12 and 13 of the Middle Run, one of three subwatersheds of the Pohick watershed. The Pohick watershed contains approximately 20,000 acres, of which approximately 11,000 acres are in the Main Branch, 2,500 acres in the Middle Run, and 6,500 acres in the South Run.

In 1965, the issuance of bonds was approved, by public referendum, to finance the extension of the County sanitary sewer system into the Pohick watershed. The following year the County entered into a contract with two property owners whereby the County, at the expense of the property owners, constructed the extension of sewer trunk lines from the Main Branch of the Pohick into the Middle Run. Reimbursement of the two property owners was to come from landowners connecting their sewer lines to the trunks.

In 1967, the County approved for the Pohick watershed a comprehensive plan, which was revised and amplified in the Restudy of the Pohick Watershed (hereinafter, the Plan), approved by the Board on September 10, 1969. The Plan contemplates ultimate overall density in Neighborhoods 12 and 13 of the Middle Run to range from a maximum of 2.0 dwelling units per acre, under conventional development, to 2.2 dwelling units per acre under cluster development. It contemplates a continuation of existing zoning in the Middle Run until 1975, and then development between 1975 and 1980, to densities throughout the subwatershed to an average of 2.0 dwelling units per acre.

The applications in question, which sought rezoning to RE-12.5, a category which permits up to 2.9 dwelling units per acre, or approximately 1,212 houses on the applicants' lands, were filed in 1970 and 1971, respectively. Action on the applications, long delayed by County officials, was forced by court orders. Based primarily on inadequacy of public facilities to justify urban density development in this area when areas already zoned or developed for urban densities had higher priority needs, the professional staff of the Planning Commission recommended denial of the applications. In September, 1972, the Planning Commission unanimously recommended to the Board that the Williams-McIlvaine application be denied and in November, 1972, unanimously recommended, with one abstention, the denial of the Van Metre application. In November and December, 1972, the Board, with two members absent, unanimously denied the applications.

The Board's assignments of error raise one crucial question, whether the chancellor erred in ruling that the Board's action in denying the landowners' applications for rezoning of their properties from RE-1 to a higher density category was unreasonable and invalid.

There is a presumption of legislative validity in the Board's actions in denying the applications. When an ap-

plicant for rezoning adduces evidence that the existing zoning ordinance, as applied to his land, is arbitrary, capricious and, therefore, invalid, and that the requested rezoning is reasonable, he has made a prima facie showing that the denial of his application is unreasonable, and the burden shifts to the legislative body to adduce evidence of reasonableness. If the evidence is sufficient to make the question of reasonableness fairly debatable, the legislative action must be sustained. *See City of Richmond* v. *Randall et al,* 215 Va. 506, 211 S.E.2d 56 (1975); *Fairfax County* v. *Snell Corp.,* 214 Va. 655, 659, 202 S.E.2d 889, 893 (1974).

The chancellor, who heard the evidence *ore tenus,* found "as a matter of fact . . . that the public facilities to serve this land are either presently available or will be available in the reasonably foreseeable future." He further found that property along the eastern boundary of the Van Metre tract and other nearby land to the north were zoned to a higher density than RE-1, and the chancellor held that "[u]nder these circumstances, the Court is of the opinion that to keep this land in one-acre zoning is unreasonable and arbitrary and capricious."

The chancellor's findings of fact are, of course, entitled to great weight and, if supported by credible evidence, will be affirmed. Code § 8-491 (Repl. Vol. 1957); *White and P & W Oil Co.* v. *Perkins,* 231 Va. 129, 189 S.E.2d 315 (1972).

The evidence of the applicants shows that trunk sewer lines are available and that the moratorium on sewer connections, imposed because of overloaded treatment facilities, will be removed upon completion of construction, projected to be in March or April of 1976, that will double the capacity of the Lower Potomac Treatment Plant.

Evidence as to public school facilities shows that, if the applicants' lands were rezoned to higher density, the County could accommodate the additional children in the school system. To accomplish this, however, it would be

necessary to resort to busing children to under-capacity school buildings, and it might be necessary to use temporary classroom facilities or go to two shifts. The County has a neighborhood school policy whereby schools are located so that elementary school pupils are within walking distance. For this reason the capacity of an elementary school planned for the area has been reduced from 990 to 660 students, and the school will be filled the day it opens. However, the neighborhood school policy is not fully implemented, and the County buses about one half its school population, including some elementary school pupils. Moreover, subdividers are generally required to dedicate school sites as a prerequisite to approval of their subdivision plans, so that additional buildings may be constructed to meet the additional needs.

The applicants' evidence shows that roads in the area are being improved and that the Virginia Department of Highways plans in 1977 or 1978 to let bids for further improvement of Old Keene Mill Road to give adequate access from the applicants' lands eastward to Interstate Highway 95. On the other hand, the Board's evidence shows that the system of secondary roads near the subject lands is deficient and that the proposed rezoning would increase the use of the road system by as many as 11,000 additional vehicle-trips each day.

On this evidence I agree with the majority opinion that the chancellor's findings of fact as to the availability of public facilities were not wrong as a matter of law. But a finding that facilities are available *or will become available in the reasonably "foreseeable" future* to accommodate higher density zoning, although it may be sufficient to show that the requested rezoning would be reasonable, is not of itself sufficient to invalidate the present zoning as to applicants' lands.

The uncontradicted evidence shows that, unlike the zonings invalidated in *City of Richmond* v. *Randall, supra,*

and in *Boggs* v. *Board of Supervisors,* 211 Va. 488, 178 S.E.d 508 (1971), the present RE-1 zoning does not of itself effect an unconstitutional denial of due process by depriving the applicants of all beneficial use of their property. It was stipulated that the property could be developed at some profit under RE-1 zoning. The evidence indicates that much greater profit could be realized from the higher density development. Applicants' expert appraiser, McKenzie Downs, was unwilling to say that the developer would make "a substantial amount more money" under higher density zoning. He testified, however, that it "could border on being somewhat ridiculous" to develop the lands under RE-1 zoning "in view of the change of the character of this neighborhood and the fact that on the southeast side of it, R-17 zoning [permitting maximum density of 2.2 dwelling units per acre] has been granted and that land will be developed on that manner."

There is other evidence that low cost residential property is non-existent in the county, that the school population has leveled off because young couples with children cannot afford to live in the county, that there is a demand for cheaper housing, and that houses in RE-1 zoning areas now sell for $70,000-$80,000 contrasted with town houses at $40,000-$50,000 in higher density zones.

The evidence shows that higher density zoning for the subject lands would not be unreasonable. Our concern, however, is the reasonableness of the Board's actions in continuing the present zoning. If that is fairly debatable, then the denial of the applications must be upheld.

The Board's evidence shows that its policy was to retard development in the Middle Run until public facilities could be made available to other areas already zoned to higher density and under development. The Board's witnesses testified that the Plan contemplates higher density zoning for the entire Middle Run between 1975 and 1980, that higher density rezoning, in accordance with the Plan, had

been granted in portions of the Main Branch, and that Neighborhood 14 of the Middle Run, adjacent to higher density development, had already been rezoned to higher density in advance of the schedule projected in the Plan. The Board's policy, the witnesses asserted, was based on economical use of County resources in providing public facilities in an orderly manner consistent with phased development.

The landowners' reliance on *Board of Supervisors* v. *Carper*, 200 Va. 653, 107 S.E.2d 390 (1959), is misplaced. There, we held invalid an amendment to the Fairfax County zoning ordinance that generally zoned the western two-thirds of the county for one agricultural district with development permitted on lots of a minimum size of two acres. Although it was conceded that the county could properly zone a reasonable area for two-acre lot development, we held that the zoning in question was exclusionary, forcing those with low incomes into the more densely developed eastern one-third of the county, and that it was therefore invalid. We noted that in *Simon* v. *Town of Needham*, 311 Mass. 560, 42 N.E.2d 516, 519 (1942), the Massachusetts court held that, in determining the reasonableness of a zoning ordinance, the economic effect of the ordinance could be considered "as more or less incidental." We also held that the "grandfather" clause in the amendment, which, for a period of two years after adoption of the ordinance, permitted developers to record plats of lots of a minimum size of one-half acre, was lacking in uniformity in violation of the enabling statute.

We further held in *Carper* that the enabling legislation which authorized counties to adopt ordinances to regulate "the density and distribution of population," did not give "the right arbitrarily or capriciously to deprive a person of the legitimate use of his property." We affirmed the finding of the trial court that the two-acre restriction was unreasonable and arbitrary and bore "no relation to the

health, safety, morals or general welfare of the owners or residents of the area so zoned."

The enabling legislation has been revised[1] since *Carper*, but the revision has not affected the principle therein set forth, that the Board cannot be empowered to act arbitrarily or capriciously to deprive landowners of the legitimate use of their lands. Insofar as *Carper* held that any economic effect on the county or rezoning may be considered only incidentally, I conclude that the revision of the enabling legislation (Code § 15.1-489) has modified the holding.

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[1] Code § 15.1-427 (Repl. Vol. 1973) provides in pertinent part:

"This chapter is intended to encourage local governments to improve public health, safety, convenience or welfare and to plan for the future development of communities to the end that transportation systems be carefully planned; that new community centers be developed with adequate highway, utility, health, educational, and recreational facilities; that the needs of agriculture, industry and business be recognized in future growth; that residential areas be provided with healthy surrounding for family life; and *that the growth of the community be consonant with the efficient and economical use of public funds.*" (Emphasis added.)

Code § 15.1-489 (Repl. Vol. 1973) provides in pertinent part:

"*Zoning ordinances shall be for the general purpose of promoting the health, safety or general welfare of the public and of further accomplishing the objectives of § 15.1-427.* To these ends, such ordinances shall be designed (1) to provide for adequate light, air, convenience of access, and safety from fire, flood and other dangers; (2) to reduce or prevent congestion in the public streets; (3) to facilitate the creation of a convenient, attractive and harmonious community; (4) *to expedite the provision of adequate* police and fire protection, disaster evacuation, civil defense, *transportation, water, sewerage, flood protection, schools, parks, forests, playgrounds, recreational facilities, airports and other public requirements;* . . . (6) *to protect against one or more of the following: overcrowding of land, undue density of population ni relation to the community facilities existing or available, obstruction of light and air, danger and congestion in travel and transportation,* or loss of life, health, or property from fire, flood, panic or other dangers; . . ." (Emphasis added.)

I further conclude, therefore, that in the present case the enabling legislation authorized the Board to provide, through zoning, for phased development "consonant with the efficient and economical use of public funds," but that this authorization for phased development could not be arbitrarily or capriciously used by the Board to deprive the applicants of the legitimate use of their land. I attach no significance to the failure of the 1972 General Assembly to enact into law S.B. 95 which would have explicitly vested authority in the Board to provide for phased development. The General Assembly may have concluded, as I have concluded, that such authority was already vested in the Board.

We have seen that the Board's action did not deprive the applicants of all beneficial use of their land, because admittedly the land could be developed under the present zoning. But the chancellor based his decision in part on his finding that other adjacent and nearby lands had been rezoned to higher densities. This requires a review of the relevant zoning classification and the Plan on which it is based.

At the time of adoption of the Pohick Plan in 1967 approximately 850 acres in the Middle Run, including the land adjacent to the applicants' property along the eastern boundary, were zoned R-17. In the 1969 Restudy various policies were approved, including the following:

> "Policy 2 The construction of community facilities should occur in accordance with the stages of land development.
>
> —Between now and 1975, the construction of community facilities should be limited to areas in the Main Branch that are north of the Southern Railroad, west of Rolling Road, and in the vicinity of Lorton.
>
> —Between 1975 and 1980, the construction of community facilities should be limited to the Main Branch and Middle Run areas.

—No community facilities should be constructed in the South Run area before 1980."

The applicants contend that the Board breached its own comprehensive plan by denying the requested rezoning and approving higher density rezoning for other applicants similarly situated. The Board correctly maintains that the comprehensive plan is not a zoning ordinance but is merely a guideline. *Fairfax County* v. *Snell Corp., supra,* 214 Va. at 660, 292 S.E.2d at 894 (1974). However, adherence to or departure from the Plan may be considered in determining whether the Board has acted reasonably in fixing zoning classifications and in acting on the rezoning applications of the applicants and other similarly situated, or whether it has denied the applicants their constitutional right to equal protection.

The applicants correctly insist that the Plan contemplates higher density zoning for their lands, but they ignore the timing of the rezoning, as it relates to the provision of public facilities, contemplated by the Plan.

Of the rezonings alleged to show discrimination by the Board against the applicants, all but four were in the Main Branch in areas where the Plan called for development of community facilities by 1975. Three of the four rezonings in the Middle Run were in Neighborhood 14, abutting higher density zoning and development to the east in the Main Branch.

The fourth rezoning in the Middle Run of which the applicants complained involves property already zoned R-17 at the time the Pohick Plan was adopted in 1967, and therefore not similarly situated to their property. In 1971 the Board rezoned the tract RTC-10 to permit townhouses, but the Board's Director of the Division of Zoning Administration testified without contradiction that the rezoning, as approved, merely resulted in a change in the form of development without any increase in the density.

Although the Board failed to review Middle Run policies each year, as the Plan required, the Board did consider the policies whenever rezoning applications were considered, and formally reviewed the policies in 1973. The Plan was not followed to the letter, and such was not necessary, but the Board followed it as a guideline and, indeed, as to Neighborhood 14, granted rezoning applications sooner than the Plan contemplated.

The present case is, in my view, distinguishable from *Fairfax County* v. *Allman*, 215 Va. 434, 211 S.E.2d 48 (1975). There the Master Plan approved for the area of Fairfax County which included the Allman property contemplated an ultimate density of 2.5 units per acre but established no guidelines for determining when the ultimate density should be attained. There was no provision for phased development within specified periods of time. In the present case there was such provision which, though not binding, evidences the best judgment of the Board as to availability of public facilities and its good faith intention to permit higher density development within the time limits contemplated in the Plan.

In *Allman* we held that the presumption of legislative validity that attached to the action of the Board in denying the rezoning application had been overcome by the applicant's evidence that the action was capricious and arbitrary, that the Board failed to rebut this prima facie case by adducing sufficient evidence to make the matter "fairly debatable," and that the trial court by necessary implication ruled that the existing zoning ordinance, as applied to the applicant's property, was unreasonable and invalid. We held, in effect, that the trial court, in making this determination, could properly apply all factors relevant to reasonableness and that the Board's evidence showing that the property could be developed at a profit under existing zoning was not of itself as a matter of law sufficient to make the reasonableness of the existing ordinance fairly debatable.

We also concluded in *Allman* that the Board discriminated against the landowner by denying his application for rezoning to a higher density and then granting the application of Clinch Corporation, pending at the same time, to rezone its land one mile away, the development of which involved the same problems for the county. The Board made no effort to distinguish the applications of the two similarly situated landowners, except to state that it had erred in rezoning the Clinch land, and its denial of the Allman application, absent any other justification, was therefore discriminatory.

Mere inequality of treatment among neighboring landowners is not of itself unconstitutional. Any zoning ordinance may involve unequal treatment, but such unequal treatment is proscribed only when it is invidious, or "arbitrary and capricious." In *Allman* we affirmed the rule that unequal treatment of similarly situated landowners is "arbitrary and capricious" when it lacks a rational basis and bears no substantial relation to the public health, safety, morals, or general welfare. With respect to the legislative action denying the requested rezoning, the trial court in *Allman* made such a finding, and we held that there was sufficient evidence to support that finding.

The classifications established here by the Board were based on a rational plan for orderly development of a subwatershed. The Board was justified in pursuing its policies of encouraging greater density in areas already zoned for such development by locating public facilities there before rezoning other lands and incurring the financial burden of installing additional public facilities.

The Board could reasonably determine that the "efficient and economical use of public funds" required deferral, for a reasonable time, of the rezoning of applicants' lands in order to postpone the cost of improving secondary highways that higher density development of applicants' lands would require. The secondary roads are there, as

the chancellor found, but they are part of a deficient road system that heavier use could make far more deficient. The facilities are available in the county to accommodate the additional school children which the higher density zoning would bring to the school system. But to make these facilities available to the applicants' lands may require temporarily the extensive busing of school children in violation of the county's neighborhood school policy. It also may require construction of additional school buildings in areas of lower priority rather than in more highly developed neighborhoods. The public facilities which the chancellor found would be available within the reasonably foreseeable future depend upon the appropriation of public funds by the Board. The construction of all public facilities, including schools, in the Pohick Watershed has been programmed in stages in conformity with the schedule of urban development projected in the Plan.

In using its zoning authority to regulate phased development of the county, the Board was following the legislative intent expressed in Code § 15.1-427 that community growth be "consonant with the efficient and economical use of public funds." The Board adduced sufficient evidence of the reasonableness of its actions in denying the applicants' request for higher density zoning to make the matter at least fairly debatable. Reasonable men could disagree as to the advisability of approving the applications at the time they were considered by the Board. Consequently, I conclude that the chancellor erred in ruling that the Board's legislative actions in denying the applications and in continuing the present zoning were arbitrary, unreasonable, and capricious.

I'Anson, C. J., *joins in this dissent.*

(Caption Omitted in Printing)

Order Staying Execution of Judgment

(August 13, 1975)

Upon consideration of the application of the appellant, by counsel, praying for a stay of execution of the decree entered herein on June 13, 1975, in order that it may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court, it is now ordered that the execution and enforcement of the decree of this court in the above-styled case entered on June 13, 1975, be, and the same is hereby, stayed, until the 11th day of Septelmber, 1975, on the expiration of which time the same may be enforced unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

A Copy,
/s/ Illegible
Teste:

Clerk

BOARD OF SUPERVISORS OF JAMES CITY COUNTY, ET AL

v.

MARVIN S. ROWE ET AL

Record No. 740994

SUPREME COURT OF VIRGINIA

June 13, 1975

Howard W. Dobbins, Richmond (William A. Young, Jr., Richard M. Price, Wallerstein, Goode & Dobbins, Richmond, on brief), for appellants.

Robert C. Fitzgerald, Fairfax (Fitzgerald & Smith, Fairfax, on brief), for appellees.

Before I'Anson, C. J., and Carrico, Harrison, Cochran, Harman, Poff and Compton, JJ.

Poff, *Justice.*

Upon a motion for declaratory judgment filed by the landowners [1] against the Board and another,[2] the trial court declared Article 8A of Chapter 20, Zoning Ordinance of James City County, including Sections 12-13 through 12-13-8 incorporated therein (hereafter 8A), facially unconstitutional in its entirety. On appeal, the Board asks us to reverse the judgment and enter final judgment declaring 8A valid in its entirety, or, in the alternative, to reverse the judgment, sever those portions of 8A found unconstitutional, and "provide guidelines" for "constitutionally acceptable" alternatives.

Landowners are the owners of 24 of 51 parcels of land in a 58-acre tract fronting a distance of about 1.4 miles on the southern side of U.S. Route 60, which, at this point, is an undivided, five-lane highway. The 58-acre tract (hereafter "the subject property") is bounded on the west by the City of Williamsburg and on the east by property owned by the Anheuser-Busch Company. The property opposite the subject property fronting on the north side of Route 60 is traversed by the main line of the C. & O. Railroad. The property south of the subject property is unde-

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[1] Malvin S. Rowe, Marjorie T. Rowe, Charisma Townhouses, Inc., W. Roland Walker, Jessie P. Bass, Thelma A. Bass, Robert E. Berry, Ruth W. Berry, Garland C. Roberts, Susie M. Roberts, George D. Thompson, Margaret J. Thompson, Donald W. Alphin, Kathleen Ordonia, C. E. Douglas, William J. Bull, Joseph C. Cauthorn, Fate Thompson, Hester Thompson, William Stone, William R. Smith, Purnell Parker, Ruth Parker, and Estate of William Booker.

[2] The Board of Supervisors of James City County and John W. Watkins, Zoning Administrator for James City County.

veloped land owned by Colonial Williamsburg Foundation. The land north of Route 60 is zoned B-1 ("general" business). The Anheuser-Busch property is zoned M-1 and M-2 ("limited" and "general" industrial) and has been developed in part as an industrial, commercial, and residential complex, and in part as the Busch Gardens, a "tourist attraction".

On January 10, 1973, the Board, by a vote of 3 to 2, enacted 8A in its original form. Under 8A, drafted with the technical assistance of Anheuser-Busch personnel, the subject property was rezoned from its B-1 classification to a new classification termed "Business Tourist Entry District, B-2". In its final form, 8A requires landowners within the B-2 district to (1) limit use of their property to hotels, motels, service stations ("with minor repair and under cover"), gift shops, antique shops, and restaurants (other than "fast food" or "drive-in" establishments); (2) build only on lots no less than 150 feet wide (or 120 feet wide for lots existing on January 10, 1973); (3) "set back" all buildings at least 75 feet from the "back of highway curb" on Route 60, or from the "top of the outer slope of the drainage way . . . if no such curb exists"; (4) dedicate the outer 55 feet of this setback for a service road, including curbs, sidewalks, and landscaped median strip; (5) construct that road "in accordance with the applicable standards of the Virginia Department of Highways" and maintain the median strip; (6) provide a 10-foot perimeter open space adjoining property lines on the sides and rear and a 10-foot perimeter open space adjacent to buildings; (7) landscape and maintain such perimeter areas in "good condition"; and (8) submit all preliminary site plans to the "Architectural Design Review Board", a five-man body appointed by the Board for two-year terms.

The landowners filed their motion praying for a declaration that these land use restrictions and obligations, as applied to their particular parcels, are unconstitutional. In a decree overruling the Board's demurrer, the trial

court found that the motion "constitutes a challenge to the validity of Article 8A . . . as a whole, and not as it affects any particular plaintiff" and ruled that "the evidence in the trial of this case shall be limited to the validity or invalidity of the ordinance as it affects all property owners in a B-2 zone". This ruling became and remains the law of the case.

By final decree entered June 12, 1974, the trial court found

> "that Article 8A . . . in its entirely, including [amendments thereto] . . . deprives the Complainants and owners in said B-2 zone of property and the reasonable use thereof without due process of law or just compensation, discriminates against said property owners, and imposes unreasonable restrictions upon the use of the properties within said B-2 zone, contains vague and indefinite language, and includes purposes and provisions not authorized by law".

Upon that finding, the trial court declared that 8A violates "Amendments V and XIV of the Constitution of the United States of America and Section 11 of Article I of the Constitution of Virginia" and is "illegal, void, and of no effect."

Some of the questions posited by the numerous assignments of error are interrelated. For the sake of convenience and clarity, we will consider them in topical categories.

I. Exhaustion of Remedies and Justiciability

On appeal, the Board relies on three of its grounds of demurrer, *viz.*, that the motion failed to allege a justiciable controversy; that the motion failed to allege an inadequate remedy at law;[5] and that the motion failed to allege an exhaustion of administrative remedies.

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[5] Since the motion originally sought injunctive relief, the proceeding was conducted on the equity side of the court.

Under Code § 8-578 (Repl.Vol.1957), an action for declaratory judgment shall not "be open to objection on the ground that a judgment or order merely declaratory of right is prayed for", and "[c]ontroversies involving the interpretation of . . . statutes, municipal ordinances and other governmental regulations, may be so determined", provided there is an "actual antagonistic assertion and denial of right." To invoke the jurisdiction of the court, "[t]he controversy must be one that is justiciable, that is, where specific adverse claims, based upon present rather than future or speculative facts, are ripe for judicial adjustment." *City of Fairfax* v. *Shanklin,* 205 Va. 227, 229, 135 S.E.2d 773, 775 (1964).

[1] The "legality of an ordinance is tested not only by what has been done under its provisions but what may be done thereunder." *City of Winchester* v. *Glover,* 199 Va. 70, 72, 97 S.E.2d 661, 663 (1957). When, as here, a property owner alleges that a zoning ordinance creates discriminatory, arbitrary, and capricious classifications bearing no substantial relation to the public health, safety, or welfare, or that a zoning ordinance imposes land use restrictions or affirmative land use land obligations so unreasonable as to constitute a "taking" of property without compensation or due process of law, or that a zoning ordinance is otherwise unconstitutional, and that he has suffered damage to his property located in a district affected by such ordinance, he has stated a case of actual controversy within the meaning of Code § 8-578 and one that is "ripe for judicial adjustment."

> "If the ordinance is unreasonable and unconstitutional in its entirety and the result of such unreasonableness is to confiscate plaintiff's property or to discriminate against it, then an action for a declaratory judgment lies." 2 A. Rathkopf, *The Law of Zoning and Planning* 35-5 (1972).

The Board argues, however, that even when the constitutionality of a legislative act is challenged, "a court of

equity does not have jurisdiction unless the complainant lacks an adequate remedy at law" and "the courts will not take jurisdiction of a zoning matter, even though a constitutional issue is raised, until the administrative remedy has been fully exhausted."

[2] A landowner aggrieved by a zoning classification has a right to apply to the zoning administrator for a variance, a right to appeal to the County Board of Zoning Appeals, and a right to obtain judicial review of that board's decision. Code §§ 15.-1-495, -497, (Repl.Vol.1973, Cum.Supp. 1974); Article 13, James City Council Zoning Ordinance. *See also, Lake George Corporation* v. *Standing*, 211 Va. 733, 180 S.E.2d 522 (1971). However, when the relief sought constitutes a challenge to the constitutionality of a zoning ordinance in its entirety,[4] only a variance providing total exemption would vindicate the rights asserted. But, under Code § 15.1-495, "all variances shall be in harmony with the intended spirit and purpose of the ordinance" in order "that the character of the district will not be changed". A variance releasing landowners from all the restrictions and obligations complained of here would be contrary to the intended "spirit and purpose" of 8A, and therefore would be beyond the purport of Code §§ 15.1-495, -497.

[3] Since there was no administrative remedy equal to the relief sought (and thus no adequate legal remedy by

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[4] A claim that a zoning ordinance is invalid in its entirety is one which alleges that "the ordinance is unreasonable in itself without regard to any particular property . . ."; where the claim is that the ordinance is invalid as applied, the alleged invalidity stems from factors "peculiar to the property involved." 2 Rathkopf, *supra* at 35-7 to 35-10. A landowner challenging the validity of a zoning ordinance as applied to his property need not apply for a variance before bringing his declaratory judgment action if the challenged restrictions or obligations could not be remedied by variance. 3 R. Anderson, *American Law of Zoning* § 24.06(670) (1968); 2 Rathkopf, *supra* at 35-6; 2 E. Yokley, *Zoning Law and Practice* § 18-11(405) (1965, Cum.Supp.1974).

judicial review), we hold that the motion properly stated a justiciable cause of action and the trial court correctly overruled the demurrer.

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We consider next the three broad constitutional issues raised by the Board's assignments of error, *viz.*, whether the B-2 zoning of the subject property to the exclusion of other areas is a discriminatory classification in violation of the equal protection guarantee; whether the land use obligations imposed by 8A violate the due process guarantee.

II. District Classifications and Equal Protection

"The governing body of any county . . . may, by ordinance, divide the territory under its jurisdiction or any substantial portion thereof into districts of such number, shape and area as it may deem best suited to carry out the purposes of this article . . . ", Code § 15.1-486 (Repl.Vol. 1973), and " . . . the regulations in one district may differ from those in other districts." Code § 15.1-488 (Repl.Vol. 1973). Encompassing the specific purposes of zoning ordinances defined in Code § 15.1-489 (Repl.Vol.1973) is "the general purpose of promoting the health, safety or general welfare of the public. . . . " By these and related statutes, the General Assembly has delegated to local governments the police power to establish and regulate zoning districts.

[4] Boundary lines of zoning districts must be struck somewhere, and a line drawn by the most impartial arbiter is, to some unavoidable degree, arbitrary.

> "It is seldom that there is any definite reason for holding that a lot on one side of a line should be devoted to one purpose and that just across it to another. The adaptability of certain territorial sections of cities to certain uses fade into each other. One end of a field may be, beyond peradventure, suited to industrial de-

velopments, the other to private homes. Intervening there must be a twilight zone. If the Legislature cannot be relied upon to say where lines must run, who can be vested with that discretion? Demonstrative accuracy is an impossibility." *West Bros. Brick Co.* v. *City of Alexandria*, 169 Va. 271, 283-84, 192 S.E. 881, 886 (1937), *app. dism'd*, 302 U.S. 658, 58 S.Ct. 369, 82, L.Ed. 508 (1937), *reh. denied*, 302 U.S. 781, 58 S.Ct. 480, 82 L.Ed. 603 (1938).

[5-7] The landowners contend that a B-2 classification for the subject property is discriminatory because the adjacent property of Anheuser-Busch is classified M-1 and M-2. Adjacency is always relevant to the question of discriminatory zoning classification, but adjacent properties may be zoned differently when there is a rational basis for the different classifications. 8 E. McQuillen, *Municipal Corporations* § 25-61(152-53) (1965); 1 Rathkopf, *supra* at 7-2 to 7-4; 1 Yokley, *supra* at § 4-17(164). *See also, Lewis* v. *District of Columbia*, 89 U.S. App. D.C. 72, 190 F.2d 25, 28 (1951). Zoning classifications of adjoining areas enjoy the presumption of legislative validity and equal protection until the presumption is overcome by evidence of discrimination. *Board of Supervisors* v. *Carper*, 200 Va. 653, 107 S.E.2d 390 (1959); *Fairfax County* v. *Parker*, 186 Va. 675, 44 S.E.2d 9 (1947). Here, as far as the landowners' evidence shows, the only indicium of similarity between the subject property and the Anheuser-Busch property is physical adjacency, and the presumption of validity of the different classifications must prevail.

Conceding that "[t]he fact that only one area of the County is included within the B-2 zone would not of itself prove discrimination", the landowners argue that "[t]he fact that other areas of the County meet the same criteria or definition as a 'tourist entry zone' but have not been burdened with the confiscatory restriction, does."

Under 8A, the B-2 classification "is not intended for general application in all parts of the County but will be

limited to those areas where high traffic volume tourist corridors exist." The record contains some evidence that the roads bearing the heaviest tourist entry into the Williamsburg area are those which approach from the north and west, and none of the property along those several roads has been zoned B-2. However, the traffic entering the area on one of those roads is only a portion of the traffic travelling both east and west along Route 60 between Williamsburg and Busch Gardens. How the latter traffic load compares with traffic between the Williamsburg area and other major tourist attractions, such as Jamestown and Yorktown, is not disclosed by the evidence. Nor is there any evidence to show that, in respects other than traffic impact, the subject property is similar to other property situated between two historical attractions.

[8] Absent such evidence, and in light of testimony that the subject property is "a very special piece of property" and is "unlike any other property in the County," the landowners failed to show that zoning of the subject property to a classification different from that assigned other areas of the county is discriminatory.

III. Land Use Obligations and Due Process

Aside from restrictions on use, 8A imposes certain affirmative obligations as conditions to the right to develop.

A. Dedication

B-2 landowners are required to dedicate to the county a parcel of land 55 feet wide fronting upon the south side of Route 60. This parcel will accommodate a sidewalk adjacent to the curb 5 feet wide, a median strip 15 feet wide, a curb 2.5 feet wide, a service road 24 feet wide, another curb 2.5 feet wide, and another sidewalk 6 feet wide. Based upon property values prior to the enactment of 8A, the value of the property required to be dedicated was in excess of $850,000.

By express statutory authorization, a landowner in Virginia may be involuntarily divested of his fee under certain defined circumstances. His land may be sold to satisfy a tax lien of the sovereign. Code § 58-1117.1 *et seq.* (Repl. Vol.1974). His land may be sold to satisfy the claim of a judgment lien creditor. Code § 8-655 *et seq.* (Repl.Vol. 1957). His land may be taken by the sovereign for public purposes by eminent domain. Code § 25-46.1 *et seq.* (Repl. Vol. 1973, Cum. Supp. 1974). In every case of involuntary taking thus authorized by statute, there is a *quid pro quo* for the loss of the fee.

In some jurisdictions, the courts have held that the zoning enabling statutes authorize local zoning bodies to require subdividers to dedicate portions of their property for public purposes (or pay an assessment in lieu of such dedication) as a condition precedent to development.[5] *As-*

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[5] The rationale for that rule is that the legislative purpose and effect of such dedication requirements is not to burden the landowner's right to use his land, but rather to enable him to put it to a use which, because of the unreasonable burden it would thrust upon public facilities, would be otherwise impermissible. Courts applying this rule have required that the public facility for which dedication is required be reasonably related to or "specifically and uniquely attributable" to the needs expected to be generated by the proposed development. *See, Exchange Nat'l Bank* v. *Lake Forest,* 40 Ill.2d 281, 287, 239 N.E.2d 819, 821 (1968); *Pioneer Trust & S. Bank* v. *Village of Mount Prospect,* 22 Ill.2d 375, 380, 176 N.E. 2d 799, 802 (1961); *Noland* v. *St. Louis County,* 478 S.W.2d 363, 367 (Mo.1972); *Brazer* v. *Borough of Mountainside,* 55 N.J. 456, 465-66, 262 A.2d 857, 862 (1970); *McKain* v. *Toledo City Plan Com'n,* 26 Ohio App.2d 171, 176, 270 N.E.2d 370, 374 (1971); *Jordan* v. *Village of Menomonee Falls,* 28 Wis.2d 608, 618, 137 N.W.2d 442, 448, *app. dism'd,* 385 U.S. 4, 87 S.Ct. 36, 17 L.Ed.2d 3 (1966). *See generally,* I. M. Heyman and T. K. Gilhool, "The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions", 73 Yale L.J. 1119 (1964); J. W. Reps and J. L. Smith, "Control of Urban Land Subdivision", 14 Syracuse L.Rev. 405 (1963); Annot., 43 A.L.R. 3d 862 (1972).

sociated Home Builders v. *City of Walnut Creek,* 4 Cal.3d 633, 94 Cal.Rptr. 630, 484 P.2d 606 (1971); *Ayres* v. *City Council of Los Angeles,* 34 Cal.2d 31, 207 P.2d 1 (1949); *Aunt Hack Ridge Estates, Inc.* v. *Planning Com'n,* 160 Conn. 109, 273 A.2d 880 (1970); *Billings Properties, Inc.* v. *Yellowstone County,* 144 Mont. 25, 394 P.2d 182 (1964); *Jenad, Inc.* v. *Village of Scaredale,* 18 N.Y.2d 78, 271 N.Y. S.2d 955, 218 N.E.2d 673 (1966) (4-3 decision); *Frank Ansuini, Inc.* v. *City of Cranston,* 107 R.I. 63, 264 A.2d 910 (1970) (approving a city's authority to require fee dedications, but holding that a requirement that 7% of subdivided land be dedicated was arbitrary, "null and void"), *Jordan* v. *Village of Menomonee Falls, supra,* 28 Wis.2d at 618, 137 N.W.2d at 448; *Prudential Trust Co.* v. *City of Laramie,* 492 P.2d 971 (Wyo. 1972).

In determining the constitutional scope of the zoning police power delegated to local governments in Virginia, we look first to our own enabling statutes. Code § 15.1-465 (Repl. Vol. 1973) authorizes local governments to "adopt an ordinance to assure the orderly subdivision of land and its development" and defines "subdivision" to mean "the division of a parcel of land into three or more lots or parcels of less than five acres each for the purpose of transfer of ownership or building development". Under Code § 15.1-466(f) (Repl.Vol.1973), such ordinance may include provisions "[f]or the acceptance of dedication for public use of any right-of-way located within any subdivision which has constructed therein, or proposed to be constructed therein, any street, curb, gutter, sidewalk, drainage or sewerage system or other improvement . . . ." Under Code § 15.1-478 (Cum.Supp.1974), recordation of a subdivision plat operates "to transfer, in fee simple," to the local government "such portion of the premises platted as is on such plat set apart from streets, alleys, or other public use and to transfer . . . any easement indicated on such plat to create a public right of passage . . . ."

[9] Clearly, the enabling statutes authorize local zoning ordinances which permit local governing bodies to *accept* dedications by *subdividers* for certain public facilities. Arguably, the language of the statutes would support an inference that local governing bodies, in the exercise of their authority to grant or withhold subdivision approval, are empowered to require an offer and acceptance of dedications for access roads and other public facilities as the price of property development. Indeed, on brief, the landowners "recognize the right of local governments to require adequate public access to lots subdivided and sold to the public." But that question, with its constitutional implications, is not before us and we do not decide it.

[10] We are not concerned with the creation of a subdivision but with development of individually-owned parcels of land. The precise question before us is whether a local governing body has the power to enact a zoning ordinance that requires individual landowners, as a condition to the right to develop their parcels, to dedicate a portion of their fee for the purpose of providing a road, the need for which is substantially generated by public traffic demands rather than by the proposed development.[6] Our enabling statutes delegate no such power.[7] Moreover, Arti-

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[6] The substantial need the service road is designed to serve is not that of the landowners; their properties abut Route 60, and they already have full access. It is true that the landowners may derive some benefit if the service road is completed in its entirety, an eventuality conditioned upon individual landowner decisions to develop every parcel in B-2. The Board's evidence shows that the primary need for the service road arises from the projected increase in tourist travel between Williamsburg and Busch Gardens.

[7] Courts in other jurisdictions have reached a similar conclusion. *See, Admiral Development Corp.* v. *City of Maitland*, 267 So.2d 860 (Fla.D.Ct.App.1972); *Coronado Development Co.* v. *City of McPherson*, 189 Kan. 174, 368 P.2d 51 (1962); *Baltimore County* v. *Security Mortgage*, 227 Md. 234, 175 A.2d 755 (1961); *Gordon* v. *City of Warren Plan & Urb. Renew. Com'n*, 388 Mich. 82, 199

cle I, § 11, of the Constitution of Virginia expressly and unequivocally provides "that the General Assembly shall not pass any law . . . whereby private property shall be taken or damaged for public uses, without just compensation." [8] The dedication requirement of 8A offends that constitutional guarantee, and we hold that it is invalid.

B. Construction and Maintenance

B-2 landowners are also required to construct the service road, curbs, and sidewalk at a cost of $37.13 per lineal foot (or $268,439.00 for the entirety) and to landscape and maintain the median strip on the land dedicated to the county. Although 8A does not speak to the question, we assume, as did witnesses for the Board, that once the road is constructed, it is to be maintained by the state.

As the Board says, the police power is "elastic". But its stretch is not infinite. If it were, no property right, indeed, no personal right, could co-exist with it.

N.W.2d 465 (1972); *West Park Ave., Inc.* v. *Ocean Tp.*, 48 N.J. 122, 224 A.2d 1 (1966); *Sanchez* v. *City of Sante Fe*, 82 N.M. 322, 481 P.2d 401 (1971); *Haughen* v. *Gleason*, 226 Or. 99, 359 P.2d 108 (1961); *City of Corpus Christi* v. *Unitarian Church*, 436 S.W.2d 923 (Tex.Civ.App. 1968).

[8] On May 18, 1974, the Colonial Williamsburg Foundation entered into a written agreement with the county to deed to the county or its designees a portion of its land adjoining the southern boundary of the subject property. On brief, the Board said that "because the Ordinance . . . required the landowners to dedicate 55′ of their property fronting on U.S. Route 60 to the County . . . for an access road . . . the County made arrangements to add a strip of land to the landowners' property to the south insofar as possible to replace the strip of land that it was restricting to the north." The record shows that not all landowners will receive an acreage rebate equivalent to the acreage dedicated, and the record is devoid of evidence showing equivalent values. We accept the Board's concession that what it called on brief "a compensatory strip of land" is not a constitutionally sufficient substitute for "just compensation".

"The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. [Citation omitted]. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

" . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415-16, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922).

[11] The Board cites nothing in the constitution, enabling statutes, or case law of Virginia which empowers the sovereign to require private landowners as a condition precedent to development, to construct or maintain public facilities on land owned by the sovereign, when the need for such facilities is not substantially generated by the proposed development.[9] The private money necessary to fund the performance of such requirements is "property", and we hold that such requirements violate the constitutional guarantee that "no person shall be deprived of his life, liberty, or property without due process of law . . . ." Constitution of Virginia, Art. I, § 11.

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[9] Just as we do not decide whether, when land is subdivided as defined in Code § 15.1-465, local governments are empowered by necessary implication of the language of the statutes to require, as the price of subdivision approval, *dedications* for access roads or other public facilities, we reserve decision on that question as it pertains to the power to require *construction* or *maintenance* of such facilities.

IV. Land Use Restrictions—Equal Protection and Due Process

[12] In the nomenclature of zoning, "use restriction" is understood to mean a restriction on the type of use to which land may be put. The land use restrictions which we treat in this Part include both qualitative and quantitative restrictions on the right to use land.

[13, 14] When a land use permited to one landowner is restricted to another similarly situated, the restriction is discriminatory, and, if not substantially related to the public health, safety, or welfare, constitutes a denial of equal protection of the laws. A restriction on the right to use which thus denies equal protection also constitutes a "taking" of one of the most valuable components of the package of private property rights, and, absent just compensation, such taking is a denial of due process of law.

A. Restrictions of Buildable Area

The "buildable area", *i.e.*, the acreage on which buildings in a B-2 zone may be constructed, is restricted by 8A to what remains after compliance with the 75-foot setback line on the front, the requirement of a 10-foot perimeter open space adjoining the property lines on the sides and rear, and the requirement of a 10-foot perimeter open space adjacent to buildings. The perimeters of open-space areas must be increased (and the buildable area decreased) by one foot for each foot of building height in excess of 35 feet, and no part of such open spaces may be used for automobile parking. The size of the buildable area is also affected by the restriction that no building may be constructed on lots less than 150 feet wide (or 120 feet wide for lots existing on January 10, 1973).

Code § 15.1-486 authorizes local governing bodies to adopt ordinances to "regulate, restrict, permit, prohibit, and determine . . . [t]he areas and dimensions of land, water, and air space to be occupied by buildings, structures

and uses, and of courts, yards, and other open spaces to be left unoccupied by uses and structures . . . ."

[15] Standing alone, this language is broad enough to authorize the use of the police power to impose reasonable restrictions on buildable area. Repeatedly, we have recognized the authority of local governments to adopt setback line restrictions. *French* v. *Town of Clintwood*, 203 Va. 562, 125 S.E2d. 798 (1962); *Nusbaum* v. *Norfolk*, 151 Va. 801, 145 S.E. 257 (1928); *Gorieb* v. *Fox*, 145 Va. 554, 134 S.E. 914, *aff'd*.. 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228 (1926). The power to prescribe reasonable minimum lot width restrictions and open space requirements is clearly within the ambit of Code § 15.1-486, and, by necessary implication from the authority to "regulate", so is the power to require that open spaces on privately-owned land be landscaped and maintained in good condition.

[16] Here, each of these requirements and restrictions on buildable area enjoys the presumption of legislative reasonableness, and the burden of rebutting the presumption, by evidence of the unreasonableness of each, rested upon the landowners. Considering each in isolation from the others, we believe that the landowners failed to overcome that presumption.

[17, 18] However, while local governments have been given the power to enact ordinances imposing such building restrictions and open space requirements, "such ordinances to be valid must be to promote public health, safety, prosperity, morals and public welfare. The mere power to enact an ordinance . . . does not carry with it the right arbitrarily or capriciously to deprive a person of the legitimate use of his property." *Board of Supervisors* v. *Carper, supra*, 200 Va. at 662, 107 S.E.2d at 396.

With the *Carper* rule in mind, we must consider these building restrictions and requirements and examine their cumulative effect.

The landowners' evidence shows that the setback restriction and the open-space requirements would prohibit construction of buildings upon a total of 16.78 acres, or about 29% of the 58 acres classified B-2. Based upon market values prior to the enactment of 8A, the value of the 16.78 acres was $1,959,167.35.

These acreage and valuation computations make no allowance for any restriction of buildable area that may result from surpassing the building height limitation or from reservation of acreage for parking needs. Parking on the service road and open spaces is forbidden. If businesses are to serve customers, landowners must provide space for parking in some area not reserved for open spaces. That area must be at least as wide as twice the length of an automobile to enable it to maneuver into and out of parking position.

The landowners introduced an expert witness whose testimony, illustrated by exhibits, showed that the buildable area restrictions as a whole rendered 17 of the 51 B-2 lots undevelopable. Disputing this evidence, the Board says that 8 of the 17 lots are developable because two or more adjacent lots are held in common ownership. Since the restrictions are addressed to individual lots, individually assessed and taxed, and since an owner of several lots (any of which he has the right to sell) cannot be deprived of the *beneficial* use of any individual lot, we fail to see how common ownership is constitutionally significant. The Board also argues that, while some of the individually-owned lots are too small for B-2 development, they are large enough to accommodate some productive development under a variance. As we noted in Part I, *supra*, however, if development requires a variance so broad that it violates the "spirit and purpose" of 8A, an application for a variance would be futile.[10]

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[10] In oral argument, the Board volunteered information that, subsequent to the trial below, a variance (the terms of which were

On cross-examination, the Board's witness, the real estate assessor and financial director of the City of Williamsburg, testified that "[s]ales have stopped after the B-2 zone went into effect." The landowners' witness, a real estate broker, testified that, based upon prior sales of similar property, the market value of the subject property prior to adoption of 8A had been $2.69 per square foot and thereafter had declined to $1.50 per square foot, while the values of neighboring properties had remained constant.

[19] Although, as we have said, we are of opinion that the landowners' evidence was insufficient to overcome the legislative presumption of reasonableness as it pertains to these buildable area restrictions *individually*, we hold that their evidence was sufficient to show that, *collectively*, those restrictions are unreasonable and bear no substantial relationship to the public health, safety, or welfare; that such evidence overcame the presumption of legislative validity; that the Board's evidence of reasonableness was insufficient to make the question fairly debatable; and that the cumulative effect of the restrictions upon buildable area was such as "to deprive a person of the legitimate use of his property" in violation of the rule in *Carper*.

B. Commercial Use Restrictions

After dividing its jurisdiction into districts, a local governing body may, within each district, "regulate, restrict, permit, prohibit, and determine . . . [t]he use of land, buildings, structures and other premises for agricultural, commercial, industrial, residential, flood plain and other specific uses." Code § 15.1-486.

Here, the Board divided its jurisdiction into districts and placed each in a broad category. Two of these cate-

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not disclosed) had been granted a B-2 landowner. We will not notice such information *de hors* the record.

gories are reserved for business uses, and the subject property has been assigned to one of these. We have rejected a constitutional challenge to this classification structure (*see* Part II, *supra*). We now consider whether the subject classifications the Board made within the category to which the subject property is assigned violate constitutional restraints.

Within the B-2 business classification, 8A separates commercial uses into two distinct sub-classes. Hotels, motels, and theatres are permitted; banks, office buildings, and grocery stores are prohibited. "Antique shops" are permitted; shops selling antique reproductions are prohibited. "Restaurants" are permitted; "fast food" or "drive-in" restaurants are prohibited. Gift shops are permitted, provided they are "accessory to hotels or motels having 50 or more dwelling or lodging units" and are "designed and scaled only to meet the requirements of occupants and their guests"; other retail stores selling identical gifts are prohibited.

[20] Like classifications of districts into broad use categories, sub-classifications of uses permitted and uses prohibited are, to some degree, arbitrary. Such sub-classifications are presumed to be reasonable, but, unless they are substantially related to the public health, safety, or welfare, the restrictions on use offend both the equal protection and due process guarantees.

> "[A] classification cannot prohibit or restrict certain uses and permit other uses where there is no valid basis, reasonably related to the public health, safety, morals, welfare or other proper object of the police power, for distinguishing between them." 8 McQuillin, *supra* at § 25-123 (332).

See e.g., *Frost* v. *Village of Glen Ellyn*, 30 Ill.2d 241, 195 N.E.2d 616 (1964) (holding exclusion of drive-in restaurant from a business zone unreasonable, arbitrary, and capricious); *Vernon Park Realty* v. *Mount Vernon*, 307

N.Y. 493, 121 N.E.2d 517 (1954) (striking down an ordinance which excluded all uses except vehicular parking).

[21, 22] One of the permissible purposes of a zoning ordinance is "to protect against destruction of or encroachment upon historic areas." Code § 15.1-489. Nothing in the evidence shows that implementation of any of the commercial uses prohibited by 8A would destroy or encroach upon Colonial Williamsburg. Nor is there any evidence that such uses are noxious, dangerous, or otherwise inimical to the public health, safety, or welfare. The exclusion from a zoning district of a particular use, or category of uses, will be upheld where that exclusion is substantially related to a proper exercise of the police power. *Fairfax County* v. *Parker, supra,* 186 Va. at 688, 44 S.E.2d at 15 (upholding a use restriction against a commercial junkyard within a residential district). But 8A excludes a large number of otherwise legitimate retail business uses from a retail business district, when nothing in the record shows that the uses excluded would be more detrimental to the public welfare than the uses permitted.

[23] The trial court ruled that 8A "imposes unreasonable restrictions upon the use of properties within said B-2 zone." Finding no substantial nexus between the commercial use restrictions imposed and the public weal, we are of opinion that the ruling of the trial court was correct; that the evidence was sufficient to overcome the legislative presumption of reasonableness; that the Board's evidence was insufficient to make the question of reasonableness fairly debatable; and that the commercial use restrictions deny B-2 landowners equal protection of the laws and constitute a "taking" of property without due process of law.

C. Architectural Design Restrictions

Under 8A, approval of preliminary site plans is made "conditional, subject to Architectural Design Review Procedures as set forth under General Provisions, Article 12,

Section 12-13." That article requires the applicant to submit "schematic architectural plans indicating accurate elevations of each facade, and sufficient detailing to indicate materials, colors, texture, light reflecting characteristics, and special features intended for the building." In deciding whether the proposed building is "acceptable," the five-man Architectural Design Review Board is to be "governed solely by the purposes of architectural design review." These purposes are:

> ". . . to protect property values and to promote the general welfare by insuring buildings in good taste, proper proportion, in general and reasonable harmony with the existing buildings in the surrounding area, and to encourage architecture which shall be distinct from the Colonial Williamsburg architecture."

Landowners assert that nothing in the enabling statutes delegates authority to local government to impose restricions on architectural design. The Board relies upon Code § 15.1-489 which provides that "ordinances shall be designed . . . to facilitate the creation of a convenient, attractive and harmonious community . . ."

[24-26] A community in which all buildings are required to conform to a particular design, or one in which a particular design is forbidden to all buildings, may be "convenient, attractive and harmonious." However, a "county cannot limit or restrict the use which a person may make of his property under the guise of its police power where the exercise of such power would be justified solely on aesthetic considerations." *Kenyon Peck* v. *Kennedy*, 210 Va. 60, 64 168 S.E.2d 117, 120-21 (1969). While the fact that aesthetic considerations entered into the reasons for the passage of an ordinance will not invalidate it, it is valid only "if other elements within the scope of police power are present." *Id.*

[27] The Board argues that "the preservation of the commercial value of an area as a tourist attraction is with-

in the police power of the local government." It is true that Code § 15.1-503.2(a) (Cum.Supp.1974) authorizes certain counties, including James City County to "adopt an ordinance setting forth the historic landmarks within the county" and to create "one or more historic districts adjacent to such landmarks" in which "no building . . . shall be erected . . . unless the same is approved by the board of supervisors of such county as being architecturally compatible with the historic landmark. . . ." However, for two reasons this statute does not give the Board the police power it claims. First, the statute expressly provides that "[n]o such historic district shall extend further than one-quarter mile from the property line of the land pertaining to any such historic landmark," and, as the parties stipulated, the Board has never adopted any ordinance designating any historical landmark within one-quarter mile of the B-2 zone. Second, the only architectural design power delegated to the county is the power to require architectural design "compatible with the historic landmark"; here, the requirement is that architectural design be "distinct from" the landmark.

[28] Some jurisdictions have adopted the rule upholding architectural design regulations when it appears that the purpose of the ordinance was to protect property values within the zone. *State* v. *Berkeley,* 458 S.W.2d 305 (Mo. 1970); *Reid* v. *Architectural Board of Review,* 119 Ohio App. 67, 192 N.E.2d 74 (1963); *Saveland Park Holding Corporation* v. *Wieland,* 269 Wis. 262, 69 N.W.2d 217, *cert. denied,* 350 U.S. 841, 76 S.Ct. 81, 100 L.Ed. 750 (1955). We decline to follow this rule when, as here, it appears that the predominant purpose of the ordinance was to promote aesthetic values and the purpose recited in the ordinance to protect property values was merely an incidental goal.

[29] Finding nothing in the enabling statutes which delegates to the Board the power it claims, we hold that the Board was without authority to impose the architec-

ural design restrictions incorporated in 8A and that, as the trial court ruled, 8A "includes purposes and provisions not authorized by law." In light of our holding, it is unnecessary to consider whether the standards governing the exercise of the legislative power delegated by the Board to the Architectural Design Review Board were unconstitutionally vague.

V. Evidentiary Issues

[30] The Board says that the trial court committed error in admitting evidence "regarding the effect of the zoning ordinance upon specific, individual parcels of land within the B-2 zone"; testimony "regarding property values on Route 60 West outside the B-2 District"; and exhibits used by the landowners' expert witness to illustrate his testimony.

The Board also contends that the trial court erred in refusing to permit its witness to testify concerning a third-party study of present and projected traffic conditions and in refusing to permit another witness "to clarify, qualify, explain, rebut and impeach" the testimony of the landowners' witness concerning the value of certain lots in the B-2 zone.

The trial judge sat without a jury. Nothing in the record indicates that his final judgment order was based on inadmissible testimony or that any evidence proffered and excluded was essential to a fair determination of the dispositive issues before him. We are of opinion that none of his evidentiary rulings constituted reversible error.

VI. Severability

Relying upon the severability clause contained in Article 16 of the James City County Zoning Ordinance, the Board asks us to sever those portions of 8A which we have found unconstitutional in order to preserve what remains.[11]

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[11] Eight months after the landowners filed their motion and about

[31, 32] Paraphasing the Supreme Court's language in *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 312-13, 56 S.Ct. 855, 80 L.Ed. 1160 (1936), quoted with approval in *Hannabass* v. *Maryland Cas. Co.*, 169 Va. 559, 571, 194 S.E. 808, 813 (1938), we posit the rules concerning severability. Absent a severability provision, a legislative act is presumed to be non-severable, and the burden of proving severability is upon the supporter of the legislation. Where a severability provision is included, a legislative act is presumed to be severable, the burden of proving non-severability is on the assailant of the legislation, and the presumption of severability must be overcome by considerations which establish the clear probability that the legislature would not have been satisfied with what remains after elimination of the invalid parts. Whether there is or is not a severability provision, "the determination, in the end, is reached by applying the same test—namely, What was the intent of the lawmakers?" 169 Va. at 571, 194 S.E. at 813. While the presence of a severability provision "provides a rule of construction which may sometimes aid in determining [legislative] intent . . . it is an aid merely;

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one month before trial, the Board adopted a new severability provision which reads as follows:

> ". . . This ordinance shall be liberally construed so as to effectuate the purposes hereof. If any clause, sentence, paragraph, section or subsection of this ordinance shall be adjudged by any court of competent jurisdiction to be invalid for any reason, including a declaration that it is contrary to the Constitution of the Commonwealth of Virginia or of the United States, or if the application thereof to any government, agency, person, or circumstance is held invalid, such judgment or holding shall be confined in its operation to the clause, sentence, paragraph, section or subsection hereof or the specific application hereof, directly involved in the controversy in which the judgment or holding shall have been rendered or made, and shall not in any way affect the validity of any other clause, sentence, paragraph, section or subsection hereof, or affect the validity of the appliaction thereof to any other government, agency, person or circumstance."

not an inexorable command." *Dorchy* v. *Kansas*, 264 U.S. 286, 290, 44 S.Ct. 323, 325, 686 L.Ed. (1924).

Here, the Board enjoys the presumption of severability. To determine whether that presumption has been overcome, we must look to see what parts of 8A remain after the parts we have found invalid are eliminated.

The parts we have found invalid include: the dedication requirement; the requirement of construction of the service road, curbs, and sidewalk; the requirement of landscaping and maintenance of the median strip on the dedicated land; the restrictions on buildable area, collectively applied; the restrictions on commercial use; and the architectural design review procedures.

The parts that remain include: one or more of the restrictions on buildable area, including the setback line restriction, the open space requirements, the minimum width lot requirement, the building height provisions, and the parking regulations, provided the effect of the collective application of more than one such restriction, provision, or regulation is not so great as "to deprive a person of the legitimate use of his property"; the requirement of landscaping and maintenance of open spaces on privately-owned property; the special regulations for underground utilities and above-ground utility facilities; the outdoor sign regulations; the site plan review requirement; and the variance and waiver clauses.

[33] We hold that the presumption of severability has been overcome. The parts eliminated are crucial to the purpose and spirit of the ordinance. Indeed, they are the vital organs of the legislative creature. The remaining parts are mere appendages, and when severed, are wholly without significant function. We confidently believe that the Board of Supervisors of James City County would not have enacted an ordinance containing only what now remains of 8A. Under the rules cited above, we hold that

the trial court did not err in striking down 8A in its entirety.

* * * * * * * * * * *

We have found no reversible error, and the final decree entered June 12, 1974, is affirmed.

However, since the enactment of 8A repealed the B-1 classification of the subject property and the effect of the final decree was to leave the land unzoned, the cause must be remanded to the trial court under instruction to enter another decree. The new decree will suspend the effective date of the June 12, 1974, decree for a prescribed period of time and direct the Board to consider further legislative action. The new decree will enjoin the Board during that period from taking any action inconsistent with this opinion. The new decree will further provide that, if the Board fails to comply within the prescribed period, the June 12, 1974, decree will become effective and the injunction will become permanent.

Affirmed and remanded.

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX

Chancery No. 36905

Supreme Court of Virginia

Record Nos. 730991 and 740029

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, *Appellant*

v.

ROY G. ALLMAN, TRUSTEE, ET AL., *Appellee*

and

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, *Appellant*

v.

THOMAS R. WILLIAMS, ET AL., *Appellee*

Law No. 26399

Chancery No. 39437

Supreme Court of Virginia

Record No. 730996

Notice of Application for a Writ of Certiorari from the United States Supreme Court and Request to Certify and Transmit the Record

Pursuant to Rule 21 of the Rules of the Supreme Court of the United States, the Board of Supervisors of Fairfax County, Virginia hereby states its intent to file a petition for certiorari with the United States Supreme Court in the above-captioned cases and requests the clerk of this court,

possessed of the records herein, to certify those records and transmit them to the United States Supreme Court.

Respectfully submitted,

BOARD OF SUPERVISORS OF
FAIRFAX COUNTY, VIRGINIA
By /s/ F. LEE RUCK, *Counsel*

/s/ F. LEE RUCK
FREDERIC LEE RUCK
County Attorney

/s/ GEORGE A. SYMANSKI, JR.
GEORGE A. SYMANSKI, JR.
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030
Counsel for Appellant

(Certificate Omitted in Printing)

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In Chancery No. 38421

GULF RESTON, INC., *Complainant,*

v.

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA,
Defendant.

Final Decree

THIS CAUSE came on to be heard the 8th day of October, 1974, upon the evidence taken and testimony heard on June 17, 18, 26 and July 9, 1974; upon the deposition of Glen

Ehrich, taken on October 4, 1974; upon the resolution of the Board of Supervisors adopted September 30, 1974; upon the testimony of James W. Todd, President of Gulf Reston, Inc., Complainant herein, and upon the Status Report filed on October 8, 1974; and upon argument of counsel; and

Upon Consideration Whereof, and it appearing to the Court that the Complainant, Gulf Reston, Inc., is the developer of the new town of Reston, an internationally known community which has been a part of the Comprehensive Plan of Fairfax County since 1962 and which has been in the development process since 1962 under a special zoning district known as "RPC," and that Gulf Reston, Inc. and its predecessor as developer of Reston has expended hundreds of million dollars in reliance upon the County's continuing approvals of plans to make Reston a community of 78,000 persons by 1982, and it further appearing that the County has been on notice of Gulf Reston's continuing needs for sanitary sewer capacity to meet its approved development schedule; and it further appearing that the Defendant Board has indicated in resolutions dated July 8, 1974 and September 30, 1974, its intention to provide sewer that will allow Reston to be developed generally according to the time schedule in its development plan; and

Upon Consideration Whereof, it is now, therefore, Adjudged, Ordered and Decreed as follows:

1. Defendant Board is under a duty to provide transportation and treatment of Reston sanitary sewage, or to acquire capacity in other systems to properly treat such sanitary sewage, in order to enable Gulf Reston, Inc. to complete Reston in accordance with its development schedule, which systems shall be so designed and constructed as to meet the approval of the State Water Control Board and other applicable regulatory agencies;

2. Defendant Board is under a duty to take all necessary and available steps to supply to Reston short term sewer capacity in the calendar years 1975, 1976 and 1977

sufficient to accommodate growth in accordance with the Comprehensive Plan for Reston;

3. Defendant Board is directed forthwith to take such steps as may be required to implement its proposed long term and mid term solutions of sewer needs for the Reston area as proposed by the resolution adopted September 30, 1974;

4. Defendant Board is directed to report to the Court by December 1, 1974, with copy to Gulf Reston, Inc., how it proposes to supply short term capacity for 1975, 1976 and 1977;

5. Defendant Board is directed to report to the Court by the first business day of each quarter beginning January 1, 1975, with copies to Gulf Reston, Inc., the progress made in the preceding quarter, making available for inspection copies of all correspondence and contract documents;

6. This cause will be retained on the docket with leave to either party to apply to the Court for such further relief as may be required in the premises;

7. The effective date of this decree is hereby stayed for thirty (30) days in order to allow the Defendant Board time within which to decide whether it will apply for an appeal.

ENTERED this 22nd day of October, 1974.

/s/ BURCH MILLSAP (s), *Judge*

SEEN:

BOOTHE, PRICHARD & DUDLEY
4085 University Drive
Fairfax, Virginia 22030

By GEORGE F. TROWBRIDGE, JR. for
E. A. PRICHARD, Esquire
Counsel for Complainant

SEEN AND EXCEPTED TO:

FREDERIC LEE RUCK
COUNTY ATTORNEY

By /s/ JFR
JOHN F. RICK, Esquire
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030
Counsel for Defendant

(Caption Omitted in Printing)

Decree

(April 21, 1975)

WHEREAS this court has determined for the reasons stated in its Final Decree dated October 22, 1974 that Reston is entitled to priority over other claimants for sewer capacity, and

WHEREAS defendant Board of Supervisors of Fairfax County has recalculated the actual and committed sewage flows to the Blue Plains sewage treatment plant, as indicated upon the February Report of Sewage Flows from Fairfax County to the District of Columbia Blue Plains Plant, which report is attached hereto as Exhibit A, and

WHEREAS such recalculation has disclosed the existence of at least .534 mgd of available capacity beyond all commitments to claimants who have paid for or have been otherwise allocated capacity to date, and

WHEREAS Complainant is willing to accept at this time an allocation of .5 mgd in addition to the capacity allocated pursuant to the order entered December 18, 1974, and

WHEREAS said capacity is expected to meet the needs of Complainant until late 1976, and

WHEREAS Complainant has agreed to pay for such sewer capacity according to the terms set forth below, it is now, therefore

ADJUDGED, ORDERED and DECREED that:

1. Complainant Gulf Reston, Inc. is hereby allocated .5 mgd capacity in the Blue Plains sewage treatment plant which capacity shall be in addition to the .5 mgd allocated pursuant to the order entered December 18, 1974.

2. Complainant Gulf Reston, Inc. shall pay for the sewer capacity allocated to it in the following manner:

a. Complainant shall pay a deposit of $200,000 which deposit shall be maintained until such time as Complainant has utilized the 1.0 mgd allocated pursuant to this decree and the decree entered December 18, 1974.

b. Upon approval of a site plan or grading plan by the appropriate County officials, Complainant will pay as a down payment 25% of the required County sewer connection charges; provided, however that Complainant's $200,000 deposit will be applied toward the down payment due upon the last sewer taps allocated pursuant to this decree and the order entered December 18, 1974.

c. Upon connection of each unit to the County sanitary sewer system, Complainant shall pay the remaining 75% of the County sewer connection charge.

3. Complainant is required to comply with the terms of Section 22-26, Code of the County of Fairfax, once a site plan or grading plan is filed, except where otherwise indicated by the terms of this decree. Nothing in Section 22-26 revokes Complainant's rights to all or any part of its 1.0 mgd reservation prior to filing of said site plans or grading plans, or requires payment therefor otherwise than as specified herein.

ENTERED this 21st day of April, 1975.

/s/ BURCH M. MILLSAP

WE ASK FOR THIS:

BOOTHE, PRICHARD & DUDLEY

By /s/ E. A. PRICHARD
E. A. PRICHARD
4085 University Drive
Fairfax, Virginia 22030
Counsel for Gulf Reston, Inc.

FREDERIC LEE RUCK
County Attorney

By /s/ JOHN F. RICK
JOHN F. RICK
Assistant County Attorney
4100 Chain Bridge Road
Fairfax, Virginia 22030
Counsel for Defendant

Fairfax County Code § 30-22.2

ONE-FAMILY RESIDENTIAL 2 ACRES. (RE-2) DISTRICT.

Column 1 Uses Permitted By Right.

1. Accessory buildings and uses as specified in section 30-3.2.
2. All agricultural uses.
3. Automobile parking as specified in sections 30-3.11 and 30-3.10.
4. Home occupations, and home professional offices.

4a. Offices for foundations formed for the promotion of the performing arts in facilities within Fairfax County which are owned by the National Park Service; provided, that:

(1) No such use shall be maintained for a period of more than 12 months.

(2) Such use shall be conducted in an existing structure located within one mile of the facility in which the performances promoted will occur.

(3) No more than 6 employees of said foundation shall be employed in such office at any one time.

5. One-family dwellings.

6. Public uses, except fire stations, subject to approval of a site plan of each development.

7. Sawmilling of timber grown on the same property.

8. Signs as specified in Article 16 of this chapter.

9. Soil removal but only as follows:

a. Removal from an R district of sod and soil to a depth of not more than eighteen inches and over an area not exceeding 5,000 square feet; or

b. Removal or excavation necessary for construction when in accordance with an approved site plan or approved plans and profiles for a subdivision when such approval has been obtained in accord with the provisions of this Code.

c. Grading of land in accord with a grading plan approved by the director, which grading plan shall provide for even finished grades which meet adjacent properties' grades and do not substantially alter natural drainage, and which plans include siltation and erosion control measures conforming with section 17-7a of this Code.

Any other grading, excavating, mining and/or burrowing of land not listed above shall be permitted only in accordance with the provisions of section 30-7.2.1 of this chapter.

10. Wayside stands for the sale of agricultural products grown in the immediate vicinity, or products of any home occupation conducted on the same property.

11. Keeping of livestock, fowl, and animals ferae naturae on any lot not less than two acres in area,

provided, however, that such minimum area shall not be deemed to limit the keeping of rabbits, hamsters, mice, guinea pigs, and other similar such small animals, or birds or fowl, for personal use or enjoyment, when such animals are not kept for sale or other commercial purpose, and further provided that such animals, birds or fowl are confined to the interior of the dwelling or other permitted accessory building not designed for the primary purpose of keeping such animals, birds or fowl.

12. Guest house as an accessory building located on a lot not less than two acres.

13. Construction or building material yard, provided that:

    (a) no such yard shall be maintained for a period in excess of 18 months unless such time be extended by the Board of Zoning Appeals.

    (b) such yard serves only the recorded subdivision within which it is located or additional sections thereof.

    (c) no portion of such yard is closer than 150 feet to any dwelling not occupied or leased by the owner of the subdivision and not nearer than 50 feet to the right of way line of any public road or street existing prior to the recordation of the subdivision served by such yard, and provided further if such yard is to be used in connection with the construction of 100 or more dwellings, then no portion thereof shall be closer than 300 feet to any dwelling not owned or leased by the owner of the subdivision and not nearer than 100 feet to the right of way line of any public road or street existing prior to the recordation of the subdivision served by such yard.

    (d) all areas of such yard and access thereto are treated or kept in such a manner as to prevent dust or debris from blowing or spreading onto the property of another or onto any public road or right of way, and are maintained in a clean and orderly manner, and building ma-

terial and construction residue and debris are not permitted to accumulate.

(e) all buildings, materials, supplies and debris are completely removed from such yard within 60 days from the date of completion of the last building to be constructed in the subdivision or within 60 days from the date active construction within the subdivision is discontinued, whichever occurs first. The use of temporary office facilities and the storage of building materials, supplies and construction equipment on a lot for use in connection with the erection of a structure or structures thereon, for which a building permit has been issued, or construction otherwise authorized, and during the actual construction of such structure or structures, are permitted uses and not subject to sub paragraphs a., b., and c., hereof.

14. Family day care homes.

Column 2 Special Permit Uses:

The uses comprised within Groups II, III, IV, V, VI, VII, VIII, and IX as set out in Sections 30-7 thru 30-7.2.10.8 may be allowed under special permit.

Column 3 Minimum Lot Size:

Area: All lots other than in approved subdivisions shall have a minimum area of two acres. In approved subdivisions, lot area shall have an average of two acres, and the minimum lot area shall be eighty thousand square feet.

In subdivisions approved for alternate density development, the minimum lot area shall be 40,000 square feet.

Width: Interior lots shall have a minimum width of two hundred feet. Corner lots shall have a minimum width of two hundred twenty-five feet.

In subdivisions approved for alternate density development, interior lots shall not have any minimum width.

Column 4 Maximum Percentage of Lot Coverage:

In subdivisions approved for alternate density development, the lots shall not cover more than 48% of the gross acreage of the subdivision, and the maximum number of lots per gross acre shall not exceed .47.

Column 5 Maximum Height of Building

Dwellings: 35 feet

Buildings used exclusively for agricultural purposes: NR

Other buildings: 45 feet, provided that a building may be erected to a maximum height of ninety feet if it is set back from every street and lot line, in addition to each of the required minimum yard dimensions, a distance of not less than two feet for each one foot of height that it exceeds the forty-five foot limit.

Column 6 Minimum Yard Dimensions and Building Location Requirements:

None of the following structures shall be located at a distance of less than 100 feet from any lot line:

a. All structures used for agriculture on a commercial scale and all other structures used for the confining or shelter of any poultry and livestock and any structures used for the confining or shelter of four or more dogs but excluding dogs of less than four months of age; except that any structure used for the confining or shelter of horses or ponies may be located not less than twenty feet from the rear lot line and forty feet from the side line on 80,000 square feet of land or more.

b. All structures used in connection with sawmilling.

Front: 50 feet from the front lot line or 75 feet from the center line of the abutting street, whichever is greater.

Wayside stands: above dimensions less 25 ft.

In subdivisions approved for alternate density development front yards shall be a minimum of 30 feet from the front lot line where facing on a local street with 50 feet of right of way or less, and a minimum

of 45 feet where facing on a local or major thoroughfare with 60 feet of right of way or more.

Side: 20 feet

In subdivisions approved for alternate density development, a minimum side yard of 15 feet and a total minimum of 40 feet shall be provided.

Rear: 25 feet, except corner lots, which setback shall be the same as side yard requirements.

Column 7 Floor Area:

NR

Column 8 Minimum Off-Street Parking Space:

1. For dwellings: one space for each dwelling unit.
2. For churches: one space for each 5 seats.
3. For all other uses: a total number of spaces sufficient to accommodate the vehicles of all employees of the establishment, plus those of all persons who may be expected to visit the same at any one time, as determined by the board of zoning appeals with respect to any use for which a permit from said board is required and by the Zoning Administrator with respect to all other uses; subject, under either procedure, to any requirements adopted by resolution of the Planning Commission in accordance with the policy as to automobile parking space set forth in sections 30-3.10 and 30-3.11.

Column 9 Other Open Space:

1. Minimum off-street loading space:
   (a) For dwellings: NR
   (b) All other uses: Sufficient space to provide on the lot for all loading and unloading of goods or persons, in connection with the use, as determined by the board of zoning appeals with respect to any use for which a permit from the said board is required and by the zoning administrator with respect to all other uses, subject, under either procedure, to any requirements adopted by resolution of the plan-

ning commission in accordance with the policy as to off-street loading space set forth in sections 30-3.10 and 30-3.3.11.

2. Adequate space for drainage, as determined in accordance with the provisions of section 30-3.6.

In subdivisions approved for alternate density development, a minimum of 3 acres of open space shall be provided in one continuous parcel of land with a minimum depth and width of 50 feet and an average of 200 feet.

In cases where the balance of land not contained in lots and streets is needed by the County of Fairfax for school sites, parks, recreational areas, highways or flood plains, the location as determined by the County Planning Engineer, and such land is suitable in size, shape, condition and topography, and such needed purpose as determined by the County Planning Engineer of Fairfax County, then this land shall be deeded to Fairfax County for such purpose.

The Planning Engineer may, however, approve the balance of the land not contained in lots and streets to be conveyed to a non profit corporate ownership authorized under the laws of Virginia, provided that the owner or developer presents a plan, proper agreements, covenants, acceptable to the County for the development and maintenance of the open land. The members of such non profit corporate ownership shall be the owners of all the lots in the subdivision and said land to be held and used for the recreational purposes for the owners of the said subdivision lots. Covenants shall provide that assessments, charges, and costs for the maintenance of open space, whether made by the corporate ownership or the County, shall constitute a pro rata lien upon the individual lots of the subdivision, second only to taxes, and any bona fide duly recorded first trust lien on each lot.

Open space not contained in lots and streets shall not be denuded, defaced nor otherwise disturbed in any manner at any time without the approval of the appropriate County Departments and in concurrence with the County Planning Engineer.

ONE-FAMILY RESIDENTIAL 1 ACRE. (RE-1) DISTRICT.

Column 1 Uses Permitted by Right:

Same as specified for RE-2.

Column 2 Special Permit Uses:

Same as specified for RE-2.

Column 3 Minimum Lot Size:

Area: All lots other than in approved subdivisions shall have a minimum area of one acre. In approved subdivisions, lot area shall have an average of one acre, and the minimum lot area shall be 40,000 sq. ft.

In subdivisions approved for alternate density development, the minimum lot area shall be 20,000 sq. ft.

Width: Interior lots shall have a minimum width of 150 ft. Corner lots shall have a minimum width of 175 ft.

In subdivisions approved for alternate density development, the interior lots shall not have any minimum width.

Column 4 Maximum Percentage of Lot Coverage:

In subdivisions approved for alternate density development, the total number of lots shall not cover more than 50% of the gross acreage of the subdivision and the maximum number of lots per gross acre shall not exceed .92.

Column 5 Maximum Height of Building:

Same as specified for RE-2.

Column 6 Minimum Yard Dimensions and Building Location Requirements:

Same as those specified for RE-2 districts, except

Side: In subdivisions approved for alternate density development a minimum side yard of 12 feet and a total minimum of 40 feet.

Column 7 Floor Area:

NR

Column 8 Minimum Off-Street Parking Space:

Same as specified for RE-2 districts.

Column 9 Other Open Space:

Same as specified for RE-2 districts.

Code of Virginia*

CHAPTER 11.

PLANNING, SUBDIVISION OF LAND AND ZONING

§ 15.1-427. Creation of local and regional planning commissions authorized; declaration of legislative intent.—The governing body of any county or municipality may by resolution or ordinance create a local planning commission or participate in a regional planning commission in order to promote the orderly development of such political subdivision and its environs. This chapter is intended to encourage local governments to improve public health, safety, convenience or welfare and to plan for the future development of communities to the end that transportation systems be carefully planned; that new community centers be developed with adequate highway, utility, health, educational, and recreational facilities; that the needs of agriculture, industry and business be recognized in future growth; that residential areas be provided with healthy surrounding for family life; and that the growth of the community be consonant with the efficient and economical use of public funds.

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* The code sections set forth are from the Code of Virginia, Title 15.1, 1973 Replacement Volume. The current Code includes some amendments. The only amendment which may be worth noting is in § 15.1-490 which now includes "the existing land use plan" and "housing" in "matters to be considered in drawing zoning ordinances and districts." In addition, the courts below made their decisions based on pre-1975 Code. Therefore, Code citations and Appendix Code sections are to the 1973 Replacement Volume.

In accomplishing the foregoing objectives such planning commissions shall serve primarily in an advisory capacity to the governing bodies.

§ 15.1-431. Advertisement of plans, ordinances, etc.; joint public hearings; written notice of certain amendments.—Plans or ordinances or amendments thereof, recommended or adopted under the powers conferred by this chapter need not be advertised in full, but may be advertised by reference. Every such advertisement shall contain a reference to the place or places within the county or municipality where copies of the proposed plans, ordinances or amendments may be examined.

When public notice is required by this chapter, the local commission shall not recommend nor the governing body adopt any plan, ordinance or amendment until notice of intention so to do has been published once a week for two successive weeks in some newspaper published or having general circulation in such county or municipality, provided, that such notice for both the local commission and the governing body may be published concurrently. Such notice shall specify the time and place of hearing at which persons affected may appear and present their views, not less than five days nor more than twenty-one days after final publication. The local commission and governing body may hold a joint public hearing after public notice as set forth hereinabove. If such joint hearing is held then public notice as set forth above need be given only by the governing body.

Except upon application of a property owner or his agent, when a proposed amendment of the zoning ordinance involves a change in the zoning classification of twenty-five or less parcels of land, then, in addition to the advertising as above required, written notice shall be given at least five days before the hearing to the owner or owners, their agent or the occupant, of each parcel involved, and to the owners, their agent or the occupant, of all abutting property and property immediately across the street or road from the property affected. Notice sent by registered or certified mail to the last known address of such

owner as shown on the current real estate tax assessment books shall be deemed adequate compliance with this requirement.

After enactment of any such plan, ordinance or amendment further publication thereof shall not be required.

§ 15.1-446. Comprehensive plan to be prepared; scope and purpose.—The local commission shall prepare and recommend a comprehensive plan for the physical development of the territory within its jurisdiction. Such plan, with the accompanying maps, plats, charts, and descriptive matter, shall show the commission's long range recommendations for the general development of the territory covered by the plan. It may include, but need not be limited to, (1) the designation of areas for various types of public and private development and use, such as different kinds of residential, commercial, industrial, agricultural, conservation, recreation, public service, flood plain and drainage, and other areas, which part of the plan may be known as a Land Use Plan; (2) the designation of a comprehensve system of transportation facilities such as streets, roads, highways, parkways, railways, bridges, viaducts, waterways, airports, ports, terminals, and other like facilities; (3) the designation of a system of community service facilities such as parks, forests, schools, playgrounds, public buildings and institutions, hospitals, community centers, waterworks, sewage disposal or waste disposal areas, and the like; and (4) the designation of areas for urban renewal or other treatment. The comprehensive plan shall be general in nature, in that it shall designate the general or approximate location, character, and extent of each feature shown on the plan, but it may indicate where existing lands or facilities are proposed to be extended, widened, removed, relocated, vacated, narrowed, abandoned, or changed in use as the case may be.

In the preparation of a comprehensive plan the commission shall make careful and comprehensive surveys and studies of the existing conditions and trends of growth, and of the probable future requirements of the community. The comprehensive plan shall be made

with the general purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the area which will, in accordance with present and probable future needs and resources, best promote the health, safety, morals, order, convenience, prosperity or general welfare of the inhabitants.

§ 15.1-447. Investigations to be made in preparation of plan; implementation of plan.—(1) In the preparation of a comprehensive plan, the local commission shall investigate such matters as the following:

(a) Existing development, use of land, trends of growth or changes, natural site characteristics, history of community population changes, population densities, employment and economic factors, existing community facilities, characteristics and conditions of existing development, areas of blight, street and highway facilities, traffic conditions, parking conditions, drainage conditions, flood control and flood damage prevention measures, transportation facilities, school and recreational facilities, and any other matters relating to the subject matter and general purposes of the comprehensive plan.

(b) Probable future economic and population growth of the community, and requirements for land areas for agriculture, forestry, urban growth, industry, transportation, water supplies, schools, parks, administrative buildings, and other public purposes.

(2) The comprehensive plan may be implemented by the preparation and recommendation, as provided in this chapter, of the following:

(a) The official map;

(b) A long-range development program of public works; projects based on the comprehensive plan and related to the financial resources of the community, which program should be reviewed annually;

(c) Detailed plans of specific projects included on the official map;

(d) A subdivision control ordinance; and

(e) A zoning ordinance and zoning districts map.

§ 15.1-448. Notice and hearing on plan; recommendation by local commission to governing body.—Prior to the recommendation of a comprehensive plan or any part thereof, the local commission shall give notice and hold a public hearing on the plan, after notice as required by § 15.1-431. After such public hearing has been held the commission may by resolution recommend the plan to the governing body, provided, however, that the board of supervisors in any county having a population of no less than twenty-two thousand and no more than twenty-two thousand, five hundred, may, as to that county, waive the provisions hereof.

The provisions of chapter 487 of the Acts of Assembly of Virginia of 1966 shall remain in full force and effect.

§ 15.1-449. Copy to be certified to governing body.—Upon recommendation of the comprehensive plan or a part thereof by the local commission, a copy thereof shall be certified to the governing body.

§ 15.1-486. Zoning ordinances generally; jurisdiction of counties and municipalities respectively.—The governing body of any county or municipality may, by ordinance, divide the territory under its jurisdiction or any substantial portion thereof into districts of such number, shape and area as it may deem best suited to carry out the purposes of this article, and in each district it may regulate, restrict, permit, prohibit, and determine the following:

(a) The use of land, buildings, structures and other premises for agricultural, commercial, industrial, residential, flood plane and other specific uses;

(b) The size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures;

(c) The areas and dimensions of land, water, and air space to be occupied by buildings, structures and uses, and of courts, yards, and other open spaces to be left unoccupied by uses and structures, including variations in the sizes of lots based on whether a public or com-

munity water supply or sewer system is available and used;

(d) The excavation or mining of soil or other natural resources; and

(e) Sedimentation and soil erosion from nonagricultural lands.

For the purpose of zoning, the governing body of a county shall have jurisdiction over all the unincorporated territory in the county, and the governing body of a municipality shall have jurisdiction over the incorporated area of the municipality.

§ 15.1-488. Regulations to be uniform.—All such regulations shall be uniform for each class or kind of buildings and uses throughout each district, but the regulations in one district may differ from those in other districts.

§ 15.1-489. Purpose of zoning ordinances.—Zoning ordinances shall be for the general purpose of promoting the health, safety or general welfare of the public and of further accomplishing the objectives of § 15.1-427. To these ends, such ordinances shall be designed (1) to provide for adequate light, air, convenience of access, and safety from fire, flood and other dangers; (2) to reduce or prevent congestion in the public streets; (3) to facilitate the creation of a convenient, attractive and harmonious community; (4) to expedite the provision of adequate police and fire protection, disaster evacuation, civil defense, transportation, water, sewerage, flood protection, schools, parks, forests, playgrounds, recreational facilities, airports and other public requirements; (5) to protect against destruction of or encroachment upon historic areas; (6) to protect against one or more of the following: overcrowding of land, undue density of population in relation to the community facilities existing or available, obstruction of light and air, danger and congestion in travel and transportation, or loss of life, health, or property from fire, flood, panic or other dangers; and (7) to encourage economic development activities that provide desirable employment and enlarge the tax base.

§ 15.1-490. Matters to be considered in drawing zoning ordinances and districts.—Zoning ordinances and districts shall be drawn with reasonable consideration for the existing use and character of property, the suitability of property for various uses, the trends of growth or change, the current and future requirements of the community as to land for various purposes as determined by population and economic studies and other studies, the transportation requirements of the community, and the requirements for schools, parks, playgrounds, recreation areas, and other public services; for the conservation of natural resources; and preservation of flood planes and for the conservation of properties and their values and the encouragement of the most appropriate use of land throughout the county or municipality.

§ 15.1-493. Preparation and adoption of zoning ordinance and map and amendments thereto.—The local commission of each county or municipality may, and at the direction of the governing body shall, prepare a proposed zoning ordinance including a map or maps showing the division of the territory into districts and a text setting forth the regulations applying in each district. The commission shall hold at least one public hearing on such proposed ordinance or any amendment of an ordinance, after notice as required by § 15.1-431, and may make appropriate changes in the proposed ordinance or amendment as a result of such hearing. Upon the completion of its work, the commission shall present the proposed ordinance or amendment including the district maps to the governing body together with its recommendations and appropriate explanatory materials.

After June twenty-ninth, nineteen hundred sixty-two, no zoning ordinance shall be amended or reenacted unless the governing body has referred the proposed amendment or reenactment to the local commission for its recommendations. Failure of the commission to report ninety days after the first meeting of the commission after the proposed amendment or reenactment has been referred to the commission, or such shorter period

as may be prescribed by the governing body, shall be deemed approval.

Before approving and adopting any zoning ordinance or amendment thereof, the governing body shall hold at least one public hearing thereon, pursuant to public notice as required by § 15.1-431, after which the governing body may make appropriate changes or corrections in the ordinance or proposed amendment; provided, however, that no additional land may be zoned to a different classification than was contained in the public notice without an additional public hearing after notice required by § 15.1-431. Such ordinances shall be enacted in the same manner as all other ordinances.

The governing body of any county which has adopted an urban county form of government provided for under chapter 15 (§ 15.1-722 et seq.) of this title may provide by ordinance for use of plans, profiles, elevations, and other such demonstrative materials in the presentation of requests for amendments to the zoning ordinance.

The adoption or amendment prior to March first, nineteen hundred sixty-eight, of any plan or ordinance under the authority of prior acts shall not be declared invalid by reason of a failure to advertise, give notice or conduct more than one public hearing as may be required by such act or by this chapter, provided a public hearing was conducted by the governing body prior to such adoption or amendment.

The adoption of a zoning ordinance prior to July one, nineteen hundred sixty-eight, by the board of supervisors of a county having the county executive form of organization and government shall not be declared invalid by reason of a failure by said board to call for and hold an election in said county for approval of said ordinance, provided that the provisions of this section for advertisement and public hearings were complied with. Nothing herein contained shall be construed so as to affect any litigation pending on March twenty, nineteen hundred seventy.

United States Constitution
Amendment XIV

SECTION I

[*Citizenship Rights Not to Be Abridged by States*]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Virginia

ARTICLE I, SECTION II

Due process of law; obligation of contracts; taking of private property; prohibited discrimination; jury trial in civil cases.—That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-388

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v.

ROY G. ALLMAN, TRUSTEE, ET AL., *Respondents.*

THE BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, *Petitioner,*

v.

THOMAS R. WILLIAMS, ET AL., *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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JURISDICTION

espondents submit this Court lacks jurisdiction to ew the subject decisions of the Supreme Court of ginia under Title 28, United States Code, Section (3), in that there is no federal constitutional issue

nor any controlling federal question as discussed in Arguments I and II, *infra,* at pages 10-33 and 33-36, respectively.

QUESTIONS PRESENTED

(1) WHETHER THE DECISIONS OF THE SUPREME COURT OF VIRGINIA IN *Allman* AND *Williams* ARE GROUNDED IN THE VIRGINIA CONSTITUTION AND IN VIRGINIA STATUTES.

(2) WHETHER, ASSUMING THE GROUNDS OF DECISION ARE UNCLEAR, THE DECISIONS SHOULD BE HELD TO REST ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

(3) WHETHER, ASSUMING FEDERAL GROUNDS OF DECISION, THE DECISIONS LIE IN AREAS OF TRADITIONAL STATE CONCERN AND, FURTHER, WHETHER THEY TURN ON THEIR PARTICULAR FACTS AND CIRCUMSTANCES AND THUS PRESENT NO QUESTION OF GENERAL IMPORTANCE SUFFICIENT TO BE WORTHY OF CERTIORARI.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents respectfully submit that the Fourteenth Amendment to the United States Constitution was not involved in the decision of the court below. That court's decision was, and this Court's review should be, limited to:

Va. Const., Art. I, § 1, Appendix *infra* at 1a,
Va. Const., Art. I, § 8, Appendix *infra* at 1a-2a,
Va. Const., Art. I, § 11, Appendix *infra* at 2a,
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Va. Code Ann., § 15.1-489, Appendix *infra* at 3a-4a,
Va. Code Ann., § 15.1-510, Appendix *infra* at 4a.

STATEMENT OF THE CASE

The Board of Supervisors of Fairfax County herein seeks review by this Court of two Supreme Court of Virginia opinions[1] affirming separate decisions of the Circuit Court of Fairfax County which invalidated denials by the Board of certain rezoning applications filed by individual owners of private property.

Allman submitted his application (C-222) to the Board in January and July 1971, seeking rezoning from RE-1 (residential, one dwelling unit per acre) to PDH-3 (planned development residential, approximately three units per acre). After denial by the Board, Allman instituted a declaratory judgment ac-

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[1] *Board of Supervisors of Fairfax County* v. *Allman*, 215 Va. 434, 211 S.E.2d 48 (1975). For the sake of consistency and brevity the following shortened references will be utilized in this Brief in Opposition. Petitioner Board of Supervisors of Fairfax County will be "the Board" or "the Petitioner"; Respondent Roy G. Allman, Trustee, and the other parties of interest who brought suit against the Board will be "Allman"; the Opinion in the Supreme Court of Virginia and the Record therein will be "*Allman*" or "*Allman* App."; the property which was the subject of Allman's Rezoning Application C-222 will be "the Allman tract" or "the subject property".

Board of Supervsors of Fairfax County v. *Williams*, 216 Va. 49, 216 S.E.2d 33 (1975). *Williams* involves suits filed on two separate denials of rezoning by the Board, one by Williams, et al. and one by Van Metre, et al. These cases were consolidated for trial and on appeal, and will be treated herein as one case. Respondent Thomas R. Williams and all other parties of interest including those in the Van Metre case who brought suit against the Board will be "Williams"; the Opinion from the Supreme Court of Virginia and the Record therein will be "*Williams*" or "*Williams* App."; the property which was the subject of both rezoning applications will be "the Williams tract" or "the subject property". Throughout this Brief in Opposition the Supreme Court of Virginia will be "the court below" or the "Supreme Court of Virginia". The Circuit Court of Fairfax County will be "the trial court" or "the Circuit Court of Fairfax County".

tion in the Circuit Court of Fairfax County seeking to have the RE-1 zoning on his property declared "arbitrary and capricious and without reasonable relation to the public health, safety, or general welfare," and to have the Board's denial of his application declared "illegal, null, and void."

The trial court, in an Order entered on July 23, 1973, found, *inter alia,* that other actions of the Board were inconsistent with its denial of Allman's application, that Allman had been subjected to discrimination which resulted in a deprivation of substantial property rights, and that the denial of Application C-222 was arbitrary and capricious and not reasonably related to the public health, safety, and welfare.[2]

The Board refused to reconsider Allman's application despite the findings of the trial court and a court Order directing reconsideration. Upon expiration of the time provided for Board reconsideration, the trial court rezoned the property in accordance with its findings.

The Board noted an appeal from both actions of the trial court. At trial and in the Supreme Court of Virginia the Board's principal argument in support of the Allman denial was an alleged inadequacy of public facilities.

The Allman property had been comprehensively planned since 1963 for the very density requested by C-222.[3] The record established the PDH-3 category was more beneficial to the County than traditional zoning categories and was preferred by the Board.[4]

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[2] *Allman* App., Vol. I at 11.

[3] *Id.*, Vol. III at 30-35.

[4] 211 S.E.2d at 53; *Allman* App., Vol. III at 44; Stipulated Exhibit 3 at 44, 50, 98.

The Supreme Court of Virginia, with a detailed examination of the record,[5] found as a fact that adequate public facilities were available or would be available by the time Allman began development, a fact confirmed by one of the Board members during the Allman public hearing. The Court further found that the Clinch, Hiddenbrook, Reston, and several other properties in Allman's immediate vicinity had been granted rezonings to higher densities during the pendency of the Allman application even though they impacted on these same "inadequate" public facilities.

The Supreme Court of Virginia found the Board's denial of the Allman application to be "inconsistent and discriminatory," and that it was therefore "arbitrary and capricious" and bore "no reasonable or substantial relation to the public health, safety, or general welfare." Contrary to Petitioner's assertion, at no point did the court tie that finding into a finding of economic preference or discrimination.

Williams submitted his application (C-169) to the Board in July, 1970, seeking rezoning from RE-1 to R-12.5 (residential, 2.9 dwelling units per acre). Williams was forced to file a mandamus action in the Circuit Court of Fairfax County in order to obtain a public hearing on his application; the Board had refused to hear certain rezoning requests while granting preferential status and public hearings to others. Williams resorted to the trial court a second time to force a decision on his application when the Board, after holding the initial court-ordered hearing, merely deferred the application for another eight months. The

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[5] 211 S.E.2d at 49-53. This Court's attention is directed to Allman's Brief of Appellee (hereafter "Allman's Brief"), pp. 3-20, where a detailed Statement of Facts is based upon specific Appendix (Record) references.

Williams application was ultimately denied on November 20, 1972, in a second court-ordered hearing.

Williams then filed his motion for declaratory judgment in the Circuit Court of Fairfax County seeking invalidation of the RE-1 zoning on the subject property because it was "arbitrary, capricious and without reasonable relation to the public health, safety, morals and general welfare." The action also sought to have the Board's denial declared illegal, null and void.

The trial court held RE-1 zoning on the subject property was unreasonable, arbitrary, and capricious, and also found that public facilities were or soon would be available to serve the land in question, that nearby similarly situated property had already been rezoned for higher density use, that existing zoning of the land in question was unreasonable and therefore invalid, and that the denial of higher density zoning was discriminatory.[6]

On appeal, the Supreme Court of Virginia addressed the same two issues addressed by the trial court: (1) Whether certain public facilities, namely highways, schools, and sewage disposal were available to serve the land in question, and (2) Whether the Board's denial of the rezoning requests was discriminatory.[7] The court below found the record supported each and every one of the findings of the trial court.[8]

The Board's main defense of its rezoning denial was again a claimed inadequacy of public facilities, which it argued in conjunction with the Middle Run Policy (adopted in 1969 for a subdistrict of Fairfax County's Pohick Planning District), a policy against develop-

[6] 216 S.E.2d at 36, 39; *Williams* App., Vol. I at 28.
[7] 216 S.E.2d at 35.
[8] 216 S.E.2d at 39-40.

ment in the Middle Run until after 1975. The Supreme Court found that the factual underpinnings of the Board's reliance upon the Middle Run Policy failed with the findings of the trial court that adequate facilities were available or would be available by the time of development.[9] The court below, in finding inconsistency and discrimination, focused upon the Board's use of the Middle Run Policy as a "sword" to permit development of 41% of the property in the Middle Run area and, relying upon the Policy's timing provisions, use of it as a "shield" to justify denial of similar treatment to other Middle Run properties similarly situated.[10]

The Supreme Court of Virginia found the Board's use of the Middle Run Policy to differentiate between similarly situated properties was discriminatory since "no demonstrated real difference" distinguished the various properties and "justified granting preferred status to one property while denying it to another." The court concluded this resulted in "the same type discriminatory practice described as arbitrary and capricious" in *Allman*. The court below further found the Board's large-lot zoning policies had the discriminatory effect of excluding "from portions of Fairfax County those persons who do not have the 'substantial means' to 'afford to move into the County'." [11]

At no point in its decision did the Virginia Supreme Court hold this discriminatory action "violated the Equal Protection Clause." It did find the "holding zone" technique had not specifically been authorized by

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[9] 216 S.E.2d at 40.
[10] 216 S.E.2d at 41.
[11] *Id.*

statute. The record reflects the Board's awareness of this lack of authorization at the time it adopted the Middle Run Policy.

Petitioner is herein asking this Court to overturn substantial findings of fact and law by both a trial and an appellate court in the face of a record which refutes the Board's arguments and proferred version of the facts.

SUMMARY OF ARGUMENT

I. The decisions of the Supreme Court of Virginia were grounded in the Virginia Constitution and in Virginia statutes. Both opinions hold the actions of the Board of Supervisors were "discriminatory," were "arbitrary and capricious," and bore "no reasonable or substantial relation to the public health, safety, morals, or general welfare."

State courts have developed a body of state constitutional law by which they review uses of state police power. Sometimes based on state due process clauses, sometimes on more general precepts of the limits of the police power, these state standards exist independently of federal law.

Virginia, like the other states, has evolved state constitutional doctrines which its courts have used regularly to measure exercises of the police power generally and the zoning power specifically. In applying these standards, Virginia courts ask whether actions are "discriminatory," "arbitrary and capricious," or "unreasonable"—the standards applied in *Allman* and *Williams*.

The two opinions were also grounded in Virginia statutes. The enabling acts delegating the police and

zoning powers to Virginia counties require those powers to be exercised to promote the "health, safety, and general welfare." In *Allman* and *Williams* the Board's actions were found to bear "no substantial relation to the public health, safety, morals, or general welfare" —language based in the statutes.

The *Allman* and *Williams* opinions were grounded in yet another Virginia statute, one requiring uniformity in zoning regulations. This statute had been applied in another Virginia decision, which in turn was used by the court in the instant cases in upholding findings of discrimination.

Opinions so firmly grounded in state law raise no question of federal law appropriate for review in this Court.

II. The decisions of the Supreme Court of Virginia rest on adequate and independent state grounds. Even assuming the decisions below are ambiguous as to their grounds—and they are not—there is in the opinions not even a scintilla of a federal ground of decision. There is an obvious basis for the decisions in Virginia law. The adequate state ground doctrine calls for the Court to decline jurisdiction.

III. Even assuming, *arguendo,* the decisions below implicated federal constitutional standards, *Allman* and *Williams* are tied to their peculiar facts and circumstances. As such, they are not worthy of certiorari.

In the first place, zoning law is notably dependent on state law and standards. Secondly, decisions on rezoning applications are by their nature ad hoc, turning

on the facts of each case. Thirdly, these cases are bound up in the particular circumstances of Fairfax County, including changes in membership on the Board of Supervisors and consequent changes in policies.

In short, resolution of these two cases, tied as they are to Virginia law and Fairfax issues, can be of little help in guiding courts in other states. Assuming (contrary to the fact) a Fourteenth Amendment aspect to the decisions below, it is hardly worth Supreme Court review to decide whether the particular facts found by the Virginia courts in necessarily ad hoc proceedings were such as to permit a conclusion that, on those facts, the Fourteenth Amendment was violated.

ARGUMENT

I. The Decisions of the Supreme Court of Virginia in *Allman* and *Williams* Were Grounded in the Virginia Constitution and in Virginia Statutes

Certiorari does not lie in this case unless Petitioner can show, as required by 28 U.S.C. § 1257(3), that the "validity of a State statute is drawn in question on the ground of its being repugnant to the [Federal] Constitution. . . ." If the decisions in *Allman* and *Williams* rest on grounds of Virginia law, this Court lacks jurisdiction and the petition for writ of certiorari must be dismissed.

A reading of the *Allman* and *Williams* opinions, and a comparison of those opinions with the Virginia Constitution, with Virginia statutes, and with Virginia cases developing and applying those constitutional and statutory standards, makes abundantly clear that the opinions are indeed based upon Virginia law, both constitutional and statutory.

The operative paragraph of the *Allman* decision is short (211 S.E.2d at 55):

> Allman has overcome the presumption of legislative validity that attached to the action of the Board in reaffirming a RE-1 classification for his land. His evidence established a course of action by the Board that was inconsistent and discriminatory. A discriminatory action is an arbitrary and a capricious action, and bears no reasonable or substantial relation to the public health, safety, morals or general welfare. The reasonableness of the Board's action is not fairly debatable, and it will not be sustained.

Similar language appears in the *Williams* decision (216 S.E.2d at 41):

> The effect of the application of the Board's Middle Run policies was to discriminate between similarly-situated property. In the present case, the discrimination was specifically and dramatically directed at the land in question. While hearing and granting other rezoning requests in the Middle Run area, the Board refused even to consider the present requests until forced by court action to hear the applications. But more important, the land in question extensively borders or is nearby other property already zoned for higher-density use. No demonstrated real difference distinguishes the various properties and justifies granting preferred status to one property while denying it to another. This is the same type discriminatory practice described as arbitrary and capricious and therefore condemned in *Board of Supervisors of Fairfax County* v. *Allman*, 215 Va. 434, 211 S.E. 2d 48 (1975).

The congruence of the two opinions becomes even more apparent when the Court in *Williams* concludes

that the discrimination there "is the same same type discriminatory practice" condemned in *Allman*.[12]

The key to both decisions therefore is an understanding of what grounds, constitutional or otherwise, underlie the Virginia Court's language of "discrimination," of "arbitrary and capricious," of actions bearing "no reasonable or substantial relation to the public health, safety, morals, or general welfare."

Petitioner would have this Court read the Virginia decisions as resting on the Fourteenth Amendment. Petitioner argues that "discrimination" must mean Fourteenth Amendment equal protection and that, in fashioning its standards for review of Fairfax County's exercise of its delegated police powers in this case, the Virginia Court was using Fourteenth Amendment due process. So to argue betrays a woeful misunderstanding of a vast body of state constitutional doctrine upon which state courts, both in Virginia and the states at large, have drawn to use due process and other clauses in state constitutions to strike down discriminatory acts by government. Petitioner's argument also ignores the extent to which Virginia zoning decisions, both those now before this Court and other earlier ones, have turned heavily on state statutes—the enabling acts which confer powers on local governments and which Virginia's courts strictly construe in reviewing the exercise of those powers.

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[12] *Williams* finds an additional "discriminatory effect" of a kind held impermissible in *Board of Supervisors* v. *Carper*, 200 Va. 653, 107 S.E.2d 390 (1959). That this brings into play a holding grounded in Virginia statutory law is discussed *infra*, pp. 27 and 30-33.

A. The Supreme Court of Virginia Relied on Standards Grounded in the Virginia Constitution

1. *The Virginia decisions rest on a body of state constitutional law which, independently of the Federal Constitution, serves as the basis for state courts to review exercises of state police power.*

The Virginia decisions in *Allman* and *Williams*, in declaring that "discriminatory" acts are arbitrary and capricious and hence not valid exercises of the police power, rest on a well-developed body of state constitutional law which, long before the existence of the Fourteenth Amendment, served as the basis for state courts to review governmental acts. Sometimes due process is couched in terms of requiring adherence to the "law of the land"—the language which appears in Article I, Section 8 of Virginia's Constitution [13]—and sometimes as "due process of law"—language appearing in Virginia's Article I, Section 11.[14] (Both the United States Supreme Court and the state courts have consistently understood "due process of law" and "law of the land" to be synonymous.)[15]

Due process of law in American jurisprudence embodies several fundamental principles:

(1) Due process of law has long connoted general application of the laws. As Daniel Webster said in his celebrated argument in the *Dartmouth College* case:

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[13] See Appendix, p. 1a *infra*.

[14] See Appendix, p. 2a *infra*.

[15] See *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. (59 U.S.) 272, 276 (1856); *State* v. *Rose*, 33 Del. 168, 132 A. 864, 868-69 (1926); *Parish* v. *East Coast Cedar Co.*, 133 N.C. 377, 45 S.E. 768, 770 (1903).

"By the law of the land is most clearly intended the general law.... The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society."[16] State courts from early days applied this principle.[17]

(2) Due process of law has long operated as a restraint on the arbitrary or capricious exercise of power. As this Court said in *Dent* v. *West Virginia*, 129 U.S. 114, 124 (1889), "The great purpose of the requirement [of due process] is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen."[18]

(3) Due process of law has long been used to protect individuals, and their life, liberty, and property, against discriminatory acts of government. The leading commentator on Virginia's Constitution has observed, "Well before the term 'equal protecton' became a familiar landmark in American jurisprudence, protection against governmental discrimination and insurance of general application of the laws were accepted connotations of Anglo-American due process of law." A. E. Dick Howard, *Commentaries on the Constitution of Virginia* (1974), I, 229-30 [hereinafter *Howard's Commentaries*]. In its report to the General Assembly, Virginia's Commission on Constitutional Revision (three of whose members sit today on the Supreme Court of Virginia) noted that "due process of law has often

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[16] *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. (17 U.S.) 518, 581 (1819).

[17] See, *e.g.*, *Vanzant* v. *Waddel*, 10 Tenn. 259, 270 (1829).

[18] See also 16 Am. Jur.2d, "Constitutional Law" § 550 at 946-47: due process of law and the equivalent phrase law of the land require that classification must not be arbitrary and capricious.

been understood to prohibit invidious discrimination." [19]

(4) Due process of law overlaps with equal protection of the laws. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954)—companion case to *Brown* v. *Board of Education*—struck down public school segregation in the District of Columbia. The Court in *Brown* relied on equal protection, but in *Bolling* it rested on the due process clause of the Fifth Amendment. Chief Justice Warren noted that "as this Court has recognized, discrimination may be so unjustified as to be violative of due process." 347 U.S. at 499.

All of these traditional bases of due process of law—general application of the laws, restraint on arbitrary or capricious acts, protection against discrimination, and ensuring equal treatment—are reflected in the Virginia Court's decisions in *Allman* and *Williams*. Clearly there is no valid reason to suppose that those opinions were grounded in the federal equal protection clause. Petitioner's effort to prove otherwise rests on the sheerest speculation.

Moreover, the Virginia opinions in *Allman* and *Williams* bear no resemblance to federal standards of due process. They belong instead to the tradition, a well established one, that state courts reviewing exercises of state police power use standards having a basis independent of the Federal Constitution. The source of these standards includes but is not limited to due process of law. This Court has recognized this independent body of state law, observing, for example, in *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 556-57 (1940), that

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[19] *The Constitution of Virginia: Report of the Commission on Constitutional Revision* (1969), p. 96 [hereinafter *CCR Report*].

the New York Court of Appeals "has ruled that its own conception of due process governs, though the same phrase in the federal constitution may have been given different scope by decisions of this Court."

With the withdrawal of the United States Supreme Court from reviewing state economic measures, "state constitutional law in some aspects [has become] the primary reliance and battleground for interests pressing for vindication." [20] The result has been the persistence of substantive due process and related concepts among the states—a willingness of courts, using doctrines drawn from state constitutional law, to take a closer look at applications of the police power than a federal court would be entitled to do under the Federal Constitution.

> Therefore, it is not surprising that just as the doctrine of substantive due process was finding expression in the states *before* 1890, so also the principle should continue to enjoy a vigorous life in some states *after* it has fallen into disuse on the national level. . . . In more recent years, state supreme courts have relied solely upon their own state constitutions.[21]

What we call "substantive due process" does not always spring from a due process clause as such (al-

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[20] Paul A. Freund, "Foreword," in *Howard's Commentaries*, p. viii.

[21] Monrad G. Paulsen, "The Persistence of Substantive Due Process in the States," 34 *Minn. L. Rev.* 91, 93, 98 (1950). See also John A. C. Hetherington, "State Economic Regulation and Substantive Due Process of Law," 53 *Nw. U. L. Rev.* 13, 226 (1958). Substantive due process is generally traced back to *Wynhamer* v. *People*, 13 N.Y. 378 (1856). See generally Edward S. Corwin, "The Doctrine of Due Process of Law Before the Civil War," 24 *Harv. L. Rev.* 366 (1911).

though frequently, of course, it does). Limitations on legislative power arise from clauses guaranteeing natural rights,[22] guarantees of "due course of law," [23] or from due process or "law of the land" provisions,[24] among others. A state constitution may contain more than one such clause; an example is the Virginia Constitution.[25] Whatever the language, such provisions have the common attribute of placing unspecified general limits on exercises of the power—limits that are expressed in terms of "discrimination," or "arbitrary and capricious," or like language.

Emphasizing the independent basis of state court review of the exercise of state police power are state decisions operating more restrictively upon state power than United States Supreme Court decisions upholding the identical or similar state measure. A striking example arose after the Supreme Court had upheld, against Fourteenth Amendment challenge, a Nebraska statute limiting fees charged by employment agencies.[26] Subsequently the Supreme Court of Nebraska struck down the same statute, relying on the Nebraska Constitution.[27]

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[22] *E.g.*, Va. Const., Art. I, § 1.

[23] *E.g.*, Ind. Const., Art. I, § 12.

[24] *E.g.*, Minn. Const., Art. I, § 2.

[25] See Va. Const., Art. I, § 1 (natural rights), Art. I, § 11 (due process).

[26] *Olsen* v. *Nebraska*, 313 U.S. 236 (1941), *rev'g State* v. *Kinney*, 138 Neb. 574, 293 N.W. 393 (1940).

[27] *Boomer* v. *Olsen*, 143 Neb. 579, 10 N.W.2d 507 (1943), relying on Neb. Const., Art. I, §§ 1, 16, 21, 25. Other examples may be found in comparing United States Supreme Court decisions upholding Green River ordinances and pay-while-voting statutes with state court decisions invalidating respectively those kinds of ordinances and statutes. See Hetherington, "State Economic Regulation and Substantive Due Process of Law," 53 *Nw. U. L. Rev.*, 226, 239, 242-43 (1958).

The United States Supreme Court, especially since decisions like *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949), and *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963), has taken a largely "hands off" attitude to state exercise of the police power in the economic sphere. The Court will, of course, have reason to intervene if that police power is used to infringe federally protected rights (*e.g.*, that private property not be taken without compensation). But where and how to circumscribe the police power is otherwise a matter for the states and their courts.[28]

2. *The Virginia decisions rest upon a body of doctrine, developed under the Virginia Constitution, by which exercises of the police power generally and of the zoning power specifically are measured by standards of "discrimination," "arbitrary and capricious," and "unreasonable."*

Even more than many states, Virginia is notable for the vitality of its tendency to look to its own constitutional doctrines and the rights of the individual. In its 1969 report to the General Assembly, the Commission on Constitutional Revision—whose chairman wrote the *Allman* opinion now before this Court—admonished that, although most of the Virginia Bill of

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[28] State courts consciously have in mind the vindication of values which a federal court faithful to the teachings of *Ferguson* has no place applying. State courts, using due process or other standards, have limited state police power in the name, for example, of the right to the "fruits of one's own industry," *State ex rel. Whetsel* v. *Wood*, 207 Okla. 193, 196, 248 P.2d 612 (1952) (invalidating statute regulating watchmakers), and a belief in "full and free competition," *Union Carbide & Carbon Corp.* v. *White River Distributors*, 224 Ark. 558, 275 S.W.2d 455, 458 (1955) (striking down "fair trade" law).

Rights provisions have a parallel in the Federal Bill of Rights, there is "no good reason not to look first to Virginia's Constitution for the safeguards of the fundamental rights of Virginians." [29]

Limitations on the police power. Especially relevant to the present case is the persistence in Virginia of judicial willingness to give closer scrutiny to the exercise of the state police power, as a matter of state constitutional doctrine, than would be appropriate for a federal court applying federal constitutional standards. Virginia's Bill of Rights (Article I, Section 1) begins with language, virtually unchanged since put there by George Mason at the Virginia Convention of 1776, stressing fundamental or natural rights, including "the means of acquiring and possessing property":

> That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Virginia's Article I, Section 1 is grounded in natural law thinking, especially that of John Locke. Notions of natural law in American jurisprudence

> came to be especially potent in such aspects of judicial review as the protection of vested rights (especially property rights and the right to contract), protection of the individual from arbitrary governmental interference with personal liberty, and applications of a test of reasonableness.[30]

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[29] *CCR Report*, p. 86.

[30] *Howard's Commentaries*, I, 66.

In Virginia the collision of property rights implicit in Section 1 and the state's police power "has led to extensive litigation."[31]

Buttressing Article I, Section 1 are other provisions of the Virginia Constitution, notably Article I, Section 8's guarantee against being "deprived of life or liberty, except by the law of the land" and the Article I, Section 11 assurance that "no person shall be deprived of his life, liberty, or property without due process of law." In fixing limits on state police power, the Supreme Court of Virginia has used sometimes one, sometimes another, of these provisions (or sometimes been inexplicit), but a common thread runs through all these cases: that exercise of the police power is to be measured by a standard of reasonableness, that there must not be discrimination, that actions must not be arbitrary or capricious, and that there must be a reasonable relation to the public health, safety, morals, or general welfare.[32]

A leading Virginia case on the limits of the police power, *Young* v. *Commonwealth,* invalidated the conviction of a merchant who had given trading stamps in violation of state law. After a lengthy analysis of the meaning of "liberty" in the context of one's right to pursue a living, the Court ruled that the legislature had acted "arbitrarily" in enacting a statute not "reasonably necessary" to the legislature's purpose. The Court rested its decision on Article I, Section 8 of the Virginia Constitution; it expressly declined to address an equal protection claim.[33]

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[31] *Id.*, I, 63.
[32] See *id.*, I, 195.
[33] 101 Va. 853, 45 S.E. 327, 331 (1903).

Since *Young*, standards of "arbitrary and capricious" or "arbitrary and unreasonable"—standards used in *Allman* and *Williams*—have been regularly applied by the Virginia Court in delineating the scope of the police power. In another leading case, *Moore* v. *Sutton*, decided in 1946, the Court used this approach in striking down a statute regulating the practice of photography. The justices could not see public health, safety, morals, or other interest sufficiently affected by the practice of photography as to justify the legislation.[34]

Other cases applying a Virginia standard of "arbitrary or unreasonable" or "arbitrary and capricious" include a decision upholding against Article I, Sections 1 and 11 challenge a statute proscribing dental advertising, upon a finding that the statute was "not so arbitrary and unreasonable as to fall before the Virginia Constitution";[35] a decision in which, passing upon the validity of a similar piece of legislation dealing with optometric advertising and challenged as contravening Article I, Sections 1 and 11 of the Virginia Constitution, the court concluded the act was not "so arbitrary or unreasonable as to contravene the proper exercise of the police power . . .";[36] and a decision reviewing a Roanoke ordinance permitting the Superintendent of Police to establish and administer the criteria to be met before a resident could obtain a license to drive, the court referring to those basic rights set forth in Article I, Section 1 of the Virginia Constitu-

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[34] *Moore* v. *Sutton*, 185 Va. 481, 39 S.E.2d 348 (1946).
[35] *Goe* v. *Gifford*, 168 Va. 497, 191 S.E. 783, 785 (1937).
[36] *Ritholz* v. *Commonwealth*, 184 Va. 339, 35 S.E.2d 210, 224 (1945).

tion as "inherent rights" of which the individual "cannot be arbitrarily deprived by the state."[37]

In applying "arbitrariness" and "reasonableness" standards, the Virginia Court has explicitly recognized that by this state law route it may invalidate exercises of the police power which might be upheld were the only question one of Fourteenth Amendment standards applied by the United States Supreme Court. In *Moore* v. *Sutton*, *supra*, striking down a statute regulating the practice of photography, the court recognized that a contrary result would be reached were the standard a federal one (citing *Nebbia* v. *New York*, 291 U.S. 502 (1934)), but it rested the result on Article I, Section 1 of the Virginia Constitution—a mandate "so vital to the welfare of a free and untrammeled people."[38]

Moore is but one example of how the Virginia Supreme Court, in fashioning standards of unreasonableness, arbitrariness, and capriciousness to limit the police power, has proceeded independently of federal constitutional standards. Sometimes the application of Virginia guidelines has produced results paralleling those reached under federal standards. For example, in *Reynolds* v. *Milk Commission*, the Virginia court in 1935, applying the standard that due process requires a law to be "neither arbitrary nor discriminatory," upheld the regulation of milk prices.[39] *Reynolds* came on the heels of the United States Supreme Court's decision validating similar regulation of the milk industry in *Nebbia* v. *New York*, 291 U.S. 502 (1934). Likewise in

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[37] *Taylor* v. *Smith*, 140 Va. 217, 124 S.E. 259, 262 (1924).
[38] 39 S.E.2d at 351, 352.
[39] 163 Va. 957, 179 S.E. 507 (1935).

1949 the Virginia court arrived at the same result reached by the United States Supreme Court in upholding a state right-to-work law, but the Virginia court rested its conclusions upon a separate analysis of the Virginia constitutional provisions.[40]

On other occasions application of Virginia standards has led to quite different results from those that a federal constitutional measure would yield. Thus, four years after *Reynolds, supra*, the Virginia court in *White* v. *Culpeper* broke from what was becoming the trend of the federal courts to abstain from interfering with state and municipal economic regulations when it invalidated Culpeper's "Green River" ordinance (proscribing uninvited door-to-door solicitation).[41] In *White* the Court found it unnecessary to cite any specific provision of the State or Federal Constitution; it simply held the police power to have been exceeded:

> It does not appear in the case at bar that the interests of the general public are affected in the slightest degree. Unless the general public is affected, there is no warrant in law for the exercise of the police power.[42]

And *White*, like the two decisions at bar, was a decision finding "discrimination" without specifically citing the Federal or State Constitution.[43]

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[40] Compare *Finney* v. *Hawkins*, 189 Va. 878, 54 S.E.2d 872 (1949), with *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949).

[41] 172 Va. 630, 1 S.E.2d 269 (1939). In *Breard* v. *Alexandria*, 341 U.S. 622 (1951), the Court unanimously upheld a Green River ordinance against a due process attack (the Court split in upholding it on First Amendment and commerce grounds).

[42] 1 S.E.2d at 272.

[43] 1 S.E.2d at 273.

The standards used by the Virginia court in *Allman* and *Williams*—finding the Board's actions to have been discriminatory and hence arbitrary and capricious—thus have their source in a long line of Virginia cases measuring exercises of the police power against the requirements of Virginia's Constitution, especially Article I, Sections 1, 8, and 11.

Zoning cases. In zoning cases specifically, as in police power cases generally, the Supreme Court of Virginia has repeatedly used Virginia standards of "arbitrary," "capricious," "unreasonable," and like language quite independently of federal constitutional measures. In *Board of Supervisors* v. *Carper*, 200 Va. 653, 107 S.E. 2d 390 (1959), the court found that the effect of Fairfax County's Freehill Ordinance was to prevent people of modest means from living in the western two-thirds of the County. Declaring that the County may not "arbitrarily or capriciously" deprive one of the legitimate use of his property, the court found the amendment to be "unreasonable and arbitrary, [bearing] no relation to the health, safety, morals or general welfare."[*] The court cited no specific state or federal constitutional provisions. In another case, *Boggs* v. *Board of Supervisors*, 211 Va. 488, 178 S.E.2d 508, 510-11 (1971), the court held that precluding a landowner of all beneficial use of his property was "unreasonable and confiscatory, and therefore unconstitutional." Here again no state or federal constitutional provisions were cited.

Further proof of the court's nonfederal approach to police power exercise in the land use field is found in *Board of Supervisors of Fairfax County* v. *Horne*, 216 Va. 113, 215 S.E.2d 453 (1975), a decision written by

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[*] 107 S.E.2d at 396-97.

Justice Cochran, the dissenting justice in *Williams*, and handed down simultaneously with *Williams*.[45] The court in *Horne* used an analysis of Virginia constitutional and legislative history to invalidate the Board's Interim Development Ordinance on the ground that there was no express or implied authority for its enactment. Although unnecessary to the ultimate grounds of decision, the court also used traditional natural rights/due process analysis and discussed at length the "delicate balance" between individual property rights and the health, safety, and welfare of the public. 215 S.E.2d at 458.

In *Allman*, the Board argued, as it does here, that the Allman application was denied because of an inadequacy of public facilities. Both the trial court and the Supreme Court of Virginia found sufficient public facilities were either available or would be available in the foreseeable future, and that other properties zoned to higher density contemporaneously with the denial of the Allman application would have the "same, or even greater, impact than would have resulted from the Allman development." In further support of its holding, the court below quoted the admission of a Board employee, Pammel, that the "Clinch development involved the same problems for the County as would Allman's development" and that the Allman proposal was actually "more favorable to the County in terms of cost benefit analysis than a standard conventional subdivision such as Clinch," whose rezoning was granted at the very time the Allman application was denied. 211 S.E.2d at 153. Such a course of action, the

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[45] In his *Williams* dissent, which the Board in its Petition has attempted to elevate to the posture of a majority opinion, Justice Cochran was careful to reaffirm and distinguish his dissent from the unanimous *Allman* opinion. 216 S.E.2d at 46-47 (dissent).

Court concluded, was "inconsistent and discriminatory." 211 S.E.2d at 53, 55.

Considering the language of Virginia cases like *Carper, supra,* and the *Allman* court's persistent advertence to the traditional Virginia constitutional terminology (arbitrary, capricious, unreasonable, inconsistency), *Allman* is firmly based upon Virginia constitutional considerations.

In *Williams,* the Virginia Supreme Court repeatedly referred to the "discriminatory effect" of the Board's "arbitrary and capricious" denial of the Williams application, and the Board's inconsistent action in using the Pohick Plan as a "sword" to permit development of some property in the Middle Run area while at the same time using it as a "shield" to justify denial of similar treatment to other properties in the same area. The Court concluded: "This is the same type discriminatory practice described as arbitrary and capricious and therefore condemned in [*Allman*]." 216 S.E.2d at 41.

In both *Allman* and *Williams* the court gave "full credit" to the presumption of validity which accompanied the Board's denials of the rezoning requests, analyzed the "reasonableness" of the Board's actions, and stated that the presumption would stand if the propriety of the zoning classification left on each property were "fairly debatable." Aside from its use of Virginia constitutional terminology and analysis, the *Williams* court's reliance upon Virginia constitutional considerations is clear (216 S.E.2d at 40) (emphasis added):

> In determining whether, in a given case, the presumption of reasonableness of zoning actions prevails or is overcome, *we have established these maxims* . . . .

When the Supreme Court of Virginia intends to rest a decision on Fourteenth Amendment due process or equal protection grounds, it has only to say so. There are ample decisions in which it has done just that.[46] In light of those decisions, it strains a point to try, as Petitioner does here, to extract a federal constitutional ground from a decision whose language is so completely in line with the general run of Virginia decisions testing exercises of the police power against Virginia standards of "discrimination," "arbitrary and capricious," and "unreasonable."

B. The Standards Relied on by the Supreme Court of Virginia Were Grounded Also in Virginia Statutes.

The *Allman* and *Williams* decisions are grounded in Virginia statutes in two ways. In the first place, the court's conclusion that the Board's actions in the respective cases were discriminatory, hence arbitrary and capricious, and thus bore "no reasonable or substantial relation to the public health, safety, morals, or general welfare"[47] directly parallels the Virginia statutes under which counties exercise the police power generally and the zoning power specifically. Secondly, the decisions rest squarely on an earlier Virginia decision, *Board of Supervisors* v. *Carper,* 200 Va. 653, 107 S.E.2d 390 (1959), which in turn had found discrimination in violation of a Virginia statute requiring uniformity in zoning regulations.

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[46] See, *e.g.*, *Archer* v. *Mayes*, 213 Va. 633, 194 S.E.2d 707 (1973); *Standard Drug Co.* v. *General Electric Co.*, 202 Va. 367, 117 S.E.2d 289 (1960); *Weber City Sanitation Comm'n.* v. *Craft*, 196 Va. 1140, 87 S.E.2d 153 (1955); *Williams* v. *City of Richmond*, 177 Va. 477, 14 S.E.2d 287 (1941).

[47] 211 S.E.2d at 55; 216 S.E.2d at 41 (the latter incorporating by reference the language of *Allman*).

Localities' powers strictly construed. In Virginia, local governments have only such powers as are affirmatively conferred upon them by the General Assembly. Under Article VIII, Section 2 of the Constitution of Virginia, the General Assembly is authorized to provide by general law or special act, for the powers to be granted local governments. In Virginia, as in many states, the courts tend to construe grants of power to localities narrowly.

Dillon's Rule, a canon of construction first advanced in the nineteenth century, was accepted in Virginia soon after its pronouncement, and it is still adhered to by her courts.[48] The rule, as reaffirmed in a 1975 Virginia case, holds that localities "have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable."[49]

In 1969 the Commission on Constitutional Revision recommended that Dillon's Rule be reversed in Virginia by constitutionally conferring on cities and certain counties all powers not denied them by the Constitution, their charters, or laws enacted by the legislature.[50] The General Assembly, however, rejected the proposal, as the Virginia Supreme Court has noted.[51]

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[48] *Kirkham* v. *Russell*, 76 Va. 956 (1882); *City of Richmond* v. *Board of Supervisors*, 199 Va. 679, 101 S.E.2d 641 (1958). For Dillon's statement of the rule, see John F. Dillon, *Law of Municipal Corporations* (2d ed., 1873), I, 173; *Clark* v. *City of Des Moines*, 19 Iowa 199, 212, 87 Am. Dec. 423 (1865).

[49] *Board of Supervisors* v. *Horne*, 216 Va. 113, 215 S.E.2d 453, 455 (1975).

[50] *CCR Report*, pp. 228-30.

[51] 215 S.E.2d at 456.

Hence the rule laid down by that court is that a county's powers "are fixed by statute and are limited to those conferred expressly or by necessary implication."[52] A corollary of the rule is that "any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the [municipality] and the power is denied."[53]

Zoning actions must promote "health, safety, or general welfare." The general police power has been delegated to the counties in Va. Code Ann. § 15.1-510:

> Any county may adopt such measures as it may determine expedient to secure and promote the health, safety and general welfare of the inhabitants of such county, not inconsistent with the general laws of this State . . . .

The zoning power has been delegated to localities by Va. Code Ann. § 15.1-486:

> The governing body of any county or municipality may, by ordinance, divide the territory under its jurisdiction . . . into districts . . . and in each district it may regulate, restrict, permit, prohibit, and determine the . . . use of land . . . .

The purpose of zoning has been defined by § 15.1-489 to be:

> . . . for the general purpose of promoting the health, safety or general welfare of the public. . . .

In *Allman* the court held that the Board's action, having been shown to be discriminatory, bore "no reasonable or substantial relation to the public health,

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[52] 215 S.E.2d at 455.

[53] *City of Richmond* v. *Board of Supervisors*, 199 Va. 679, 101 S.E.2d 641 (1958).

safety, morals, or general welfare." In *Williams* the court found the "discriminatory practice" in that case to fall within the condemnation in *Allman*. The language of those opinions is grounded both in the Virginia statute (Va. Code Ann. § 15.1-510) giving counties the general police power to promote the "health, safety, and general welfare" and in the statute (Va. Code Ann. § 15.1-489) defining the purpose of zoning ordinances as being to promote the "health, safety, or general welfare" of the public. The Board's actions in both *Allman* and *Williams* were found not to bear a reasonable relation to the public health, safety, morals, or welfare; hence they could not have been a valid exercise of the police and zoning powers conferred by statute.

Statutory requirement of uniformity. Another relevant statute is Va. Code Ann. § 15.1-488, which lays down the requirement of uniformity in zoning actions: "All such [zoning] regulations shall be uniform for each class or kind of buildings and uses throughout each district . . . ."

A look at the arguments made to the Supreme Court of Virginia in both *Allman* and *Williams* and a comparison of those arguments with the decisions themselves makes clear the grounding of those decisions in Virginia statute law. In their brief before the Virginia court in *Allman,* counsel for Allman argued that the denial of the rezoning was "discriminatory and without legal justification." The brief cited both the Fourteenth Amendment and the Virginia Constitution.[54] Yet the *entire* argument developing the discrimination point sought to bring *Allman* within another Virginia decision, *Board of Supervisors* v. *Carper,* 200 Va. 653,

[54] Allman brief, p. 44.

107 S.E.2d 390 (1959), in which the Court had held that an amendment to the Fairfax County zoning ordinance permitting "a person to build on a lot of less than two acres, while denying his neighbor the right to build unless he puts his house on a lot containing a minimum of two acres" lacked uniformity and therefore violated the predecessor of Va. Code Ann. § 15.1-488. Allman's brief concluded its discrimination argument by saying (Brief, p. 48):

> To paraphrase *Carper,* if the facilities and services were in such dire [straits], and if the public health, safety and welfare were to be detrimentally impacted by the Allman application, then why did the Board permit the zoning and development of surrounding properties in comparable or greater densities during the same period of time?

Likewise when the brief for Williams before the Virginia Supreme Court argued that the Board's denial was "discriminatory and without legal justification," that brief, too, made perfunctory citation of the Fourteenth Amendment and the Virginia Constitution.[55] But the *entire* discrimination argument developed the thesis that the *Carper* Court's interpretation of the Virginia uniformity statute supported the trial court's finding of discrimination in this case. Thus Williams's brief concluded its discrimination argument by saying (Brief, p. 42):

> Denial of Williams in the face of continued development activity in the Middle Run in the immediate vicinity of Williams, is clearly discriminatory. To paraphrase *Carper,* if facilities and services were in such dire [straits], and if the Williams's applications were to detrimentally impact the public health, safety and welfare, then why

[55] Williams brief, p. 40.

> did the Board grandfather the zoning and development of surrounding properties in comparable or greater densities during the same period of time?

In sum, the discrimination argument in both the *Allman* and *Williams* briefs was based squarely on the Virginia uniformity statute as interpreted in *Carper*. That statute therefore underpins the conclusion of the court in *Allman*, 211 S.E.2d at 55, that Allman's evidence "established a course of action by the Board that was inconsistent and discriminatory" and the court's conclusion in *Williams*, 216 S.E.2d at 41, that the effect of the Board's action "was to discriminate between similarly situated property . . . [T]he land in question extensively borders or is nearby other property already zoned for higher density use. No demonstrated real difference distinguishes the various properties and justifies granting preferred status to one property while denying it to another."

Perhaps the most telling evidence that the Virginia decisions are grounded in the Virginia statutes rather than in Fourteenth Amendment equal protection comes from the County's Petition for Rehearing in the Virginia Supreme Court in *Allman*. In that Petition the County states quite candidly that "the federal concept of equal protection . . . is also codified in Virginia zoning law (*Va. Code Ann.*, § 15.1-488), which requires that all property in the same category (*e.g.*, RE-1) be subject to the same restrictions."[56] It must be more than a little embarrassing for Petitioner, having conceded that the Virginia statute—to which the Court's holding on both *Allman* and *Williams* owes such an obvious debt—embodies the concept of federal equal

[56] Petition for Rehearing, p. 6.

protection, now to argue that the Virginia court's conclusion of "discrimination" must refer to the Fourteenth Amendment rather than to the Virginia statute.

II. The Decisions of the Supreme Court of Virginia Rest on Adequate and Independent State Grounds

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb* v. *Pitcairn*, 324 U.S. 117, 125 (1945). The burden is on Petitioner seeking a writ of certiorari from this Court to make an affirmative showing from the record

> not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

Lynch v. *New York ex rel. Pierson*, 293 U.S. 52, 54 (1934). The basis for this rule lies in the limits of the Court's jurisdiction—that the Court's only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. *Herb* v. *Pitcairn*, 324 U.S. at 125-26.

Petitioner submits in this case that the grounds of the Virginia decisions in *Allman* and *Williams* are unclear. Petitioner proceeds to argue that when it is unclear whether the state decision rests on state or federal grounds the Court should grant certiorari.

Petitioner errs in both regards. Even assuming ambiguity as to the grounds of decision below—which there is not—and it were tenable to argue that the Vir-

ginia decisions might have rested on either Virginia or federal grounds, this Court has stated, *Lynch* v. *New York ex rel. Pierson*, 293 U.S. at 54-55:

> Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction.

If the state court opinion be considered ambiguous, "we should choose the interpretation which does not face us with a constitutional question." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 299-300 (1956).

Equally fundamental is Petitioner's error in suggesting that there is reason to suppose the Virginia decisions involved any federal ground at all. One has to struggle to read even a hint of a federal ground into either decision. Nowhere in either the *Allman* or the *Williams* decision is there any reference to the Federal Constitution or to any federal statute. Nowhere is there a reference to or reliance upon the findings of a federal case.[37] Nowhere in the *Allman* or *Williams* holdings is there a reliance upon either the principles derived from or language found in the Federal Constitution, federal statutes, or federal case law. Nowhere can there be singled out any intimation or impression that the Virginia Supreme Court felt compelled by the Federal Constitution to invalidate the Board's legislative acts. Neither case came to the Supreme Court of Virginia with any indication of a determination by the

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[37] *Allman*, 211 S.E.2d at 54, quotes a passage from *County of Fairfax* v. *Parker*, 186 Va. 675, 44 S.E.2d 9, 11-12 (1947), which in turn cites *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926).

trial courts of federal constitutional or statutory questions. Both cases entail substantial findings of fact by both the trial court and the Virginia Supreme Court. In both cases the actual underpinnings offered by the Board in support of the validity of its acts was, in the opinion of both the trial court and the Supreme Court, not even fairly debatable. The principal Virginia case relied upon by the court below, *Caper*, *supra*, clearly rested upon a series of factual determinations concerning violation of a state statute requiring uniformity in zoning ordinances.

The Board's reliance upon *Minnesota* v. *National Tea Company*, 309 U.S. 551 (1940), is unfounded. In *National Tea*, the Supreme Court of Minnesota explicitly discussed in its opinion both the equal protection clause of the Fourteenth Amendment of the Federal Constitution as well as Article IX, Section 1 of the Minnesota Constitution. It quoted the conclusion of the lower Minnesota court that the subject statute violated both federal and state constitutional principles; the Court appeared to place substantial reliance upon five different federal court decisions. 309 U.S. at 552, 555. This Court held that "the opinion as a whole leaves the impression that the [Minnesota] court probably felt constrained to rule as it did because of five [cited] decisions . . ." which rested on Federal Fourteenth Amendment considerations. *Ibid.* This Court was concerned about the "strong indication" that the Federal Constitution controlled the Minnesota decision. 309 U.S. at 556.

That state and federal constitutions have similar provisions is, of course, no reason to assume that a state court decision was grounded on the Federal Constitution. *Jankovich* v. *Indiana Toll Road Comm'n*, 379

U.S. 487, 491 (1965). Especially is this true where, as here, the state decision makes no mention whatever of *either* constitution.

The true ground of decision in the state court opinion may be sought in the "organization and language of the opinion." *Jankovich* v. *Indiana Toll Road Comm'n*, 397 U.S. at 491. In this brief in opposition, we have shown how the *Allman* and *Williams* decisions are grounded in a well developed body of Virginia constitutional principles, in the established state law standards (resting upon Dillon's Rule) for reviewing localities' exercise of delegated police and zoning powers, and in Virginia statutes requiring uniformity in zoning decisions. Even were one to strain the *Allman* and *Williams* opinions and somehow, against all the evidence, infer some federal dimension, the obvious grounding in Virginia constitutional and statutory law would still constitute an adequate and independent state ground of decision requiring dismissal.

III. Even Assuming Federal Grounds of Decision Are Involved in *Allman* and *Williams*, the Decisions Involve Matters of Traditional State Concern. Further, Because They Turn on Local Facts and Circumstances, the Decisions Present No Question of Sufficiently General Importance Worthy of Certiorari.

A. Zoning and Land Use Are Matters of Traditional State and Local Concern Properly Left to State Legislatures and Courts

Zoning and land use are matters peculiarly within the state interest and concern. Indeed the authority to regulate and control the individual property owner's use of land resides in the local jurisdiction under the police power pursuant to a delegation of this authority

by the state legislature.[38] If the present system of delegating and defining the scope of the zoning power does not effectively serve the interest of a particular state in furthering the general welfare of the locality, region, or entire state,

> It is the state legislature's and not the federal courts' role to intervene and adjust the system . . . [T]he federal court is not a super zoning board . . . *Construction Industry Association of Sonoma County* v. *Petaluma*, Slip Opinion at 17, Record No. 74-2100 (9th Cir., August 13, 1975).

The proper forum for resolving land use questions and policies is at the state and or local level. A dramatic intrusion of the kind sought by Petitioner into an area of traditional state concern is not warranted. Cf. *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 40 (1973).

The Board also argues that the Virginia court's decision invalidating the Board's actions in these two cases denies other citizens of Fairfax County due process of law by impairing the Board's legislative functions. Aside from ignoring the court's finding that the Board's land use policies in fact discriminate against and exclude "other citizens," such an argument asks this Court to review a state court's decisions about the reach and amenability to judicial scrutiny of state police power, a matter peculiarly governed by state law. Decisions as to what functions should be performed by state courts and what by legislative bodies, in short questions of separation of powers in state and local governments, are for the states to decide. Cf. *Sweezy* v. *New Hampshire*, 354 U.S. 234, 255 (1957).

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[38] See Va. Code Ann. §§ 15.1-486, -489 in Appendix, *infra*, at pp. 2a, 3a.

B. Zoning Decisions Turn on Local Facts and Circumstances and Hence Involve Issues of Limited Application.

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Rule 19. Obviously if a case involves legal principles which of their nature vary from one state or locality to another, or if the case turns on its particular facts and circumstances, Supreme Court review is not appropriate. This is such a case.

For the Board to argue that the net effect of two Virginia land use decisions "could be to return the United States to the uncontrolled situation that existed prior to . . . *Euclid* . . ." [59] is preposterous. A quick review of state zoning decisions, with particular focus on California, Florida, Illinois, Maryland, Nevada, New Jersey, New York, Oregon, Pennsylvania, Utah, and Virginia, reflects a wide and often conflicting divergence of opinion, interpretation, and restriction or approval of police power zoning activity. Oregon, for example, considers zoning activity by the local governing body to be quasi-judicial in nature whereas Virginia and the majority of states consider zoning to be a legislative act. Compare *Fasano* v. *Board of County Commissioners*, 507 P.2d 23 (Ore. 1973), with *Boggs* v. *Board of Supervisors, supra*, 178 S.E.2d at 511 (1971).

The states have, apparently, demonstrated no particular inclination to be overly influenced in their land use decisions by the decisions of other courts or the statutory construction of other local and state juristions. Despite the many areas of disagreement, the

[59] Petition for Writ of Certiorari at 58.

Board has conceded that zoning and land use are presently in a regulated or controlled situation.[60]

Zoning issues, especially the reasonableness of ad hoc decisions on particular rezoning applications, typically are determined on the basis of the facts and circumstances in each case. *Euclid* v. *Ambler Realty Co., supra,* 272 U.S. at 387-88. The precedential value of any particular case is therefore inherently limited even within its own jurisdiction, and its ability to exert influence across state lines is even more tentative.

C. *Allman* AND *Williams* TURN ON THEIR FACTS AND ON THE PARTICULAR CIRCUMSTANCES IN FAIRFAX COUNTY.

The facts and circumstances in both *Allman* and *Williams* greatly limit their precedential value. In each case the application of long-established zoning principles to a particular factual pattern resulted in a finding of arbitrary and capricious legislative activity discriminating against and resulting in a denial of due process to the subject property owners. There are certainly no new principles of law enunciated in either case.[61]

Allman involves the denial by a local governing body of a zoning application seeking approval of a land use comprehensively planned for fifteen years. The Vir-

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[60] Ibid.

[61] In oral argument on its Petition for Writ of Error and again on Appeal, the Board exhorted the court below to take a "fresh look" at and redefine the zoning "rules" in Virginia as there had been no "major review" since *Carper*, handed down 15 years previously. Upon reaffirmation of the *Carper* principles in *Allman* and *Williams*, the Board now argues that these cases will cause a loss of control over zoning laws throughout the country. The Board's inconsistency reflects appalling opportunism.

ginia court found that Allman's PDH-3 proposal would have provided the Court substantially greater benefit with more control over ultimate development than would the traditional zoning categories."[62]

The Allman application was submitted for PHD zoning in an effort to comply with Board policy which encouraged PDH uses in the Upper Potomac Planning District suburban density clusters. Allman was located within one of those planned clusters, the Herndon cluster.[63]

Prior and subsequent to the Allman denial the Board granted higher density rezonings on several other properties in the immediate vicinity of the Allman tract. All were located in the same Upper Potomac Planning District of Fairfax County, and all but the Reston applications were part of the planned Herndon cluster. All but the Reston applications were granted for traditional zoning categories rather than the preferred, more beneficial PDH category. All were served by the same public facilities, and both state courts found that the other applications would have the same or greater impact than Allman on the facilities. *Allman*, 211 S.E.2d at 54. Allman had greater access to better roads than, for example, did the Clinch or Reston applications.

Despite its strained arguments to the contrary, the Board has conceded that Allman was situated similarly to those properties granted rezonings.[64] And the testimony of a series of department level Board employees,

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[62] 211 S.E.2d at 53; *Allman* App., Vol. II at 140-41.

[63] *Allman* App., Vol. II at 123, 141; Vol. III at 44.

[64] "Much has been made of the *fact* that the *Williams* and *Allman* properties were similarly situated to those of other landowners whose property fell . . . on the more fortunate side of the [rezoning] line." Petition for Writ of Certiorari at 25-6.

including the recalcitrant Mr. Pammel,[65] established unequivocally the availability of public facilities to the Allman tract. The court below found the Board's argument that Allman would have unduly impacted available public facilities was negated by the evidence,[66] and concluded the reason for the Board's denial by a four-to-three vote was "prematurity"[67] despite the fact Allman had for fifteen years been comprehensively planned for the density sought. The court also found that Reston was accorded preferential zoning status as a matter of policy, to the detriment or deprivation of Allman and other land owners in the area.

In *Williams* the Supreme Court of Virginia examined the entire record and found it supported "each and every one of the trial court's findings": (1) public facilities were or soon would be available to serve the land in question, (2) nearby similarly situated property had already been rezoned for higher density use, (3) the zoning existing on the subject property was unreasonable and therefore invalid, and (4) it was discriminatory and therefore arbitrary and capricious to deny the higher density zoning sought by Williams.[68]

Evidence offered by Williams established the superior suitability of the subject property for development in the R-12.5 category, the change in character of the neighbrhood from RE-1, the higher cost of one acre development, the vast diminution in value resulting from retention of the RE-1 category, the tremendous shortage of buildable lots in Fairfax County, and

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[65] *Allman* App., Vol. II at 123, *et. seq.*
[66] 211 S.E.2d at 54.
[67] 211 S.E.2d at 52; *Allman* App., Vol. II at 149.
[68] 216 S.E.2d at 39-40.

the exclusionary effect of the Board's land use policies creating a County for the "fairly rich". Each evidentiary element went uncontradicted by the Board. The Board's denial of Williams was rendered totally untenable and thus unreasonable, however, by the finding below of public facilities availability. "The factual underpinning of the Board's reliance [on the timing mechanism in its Middle Run policy] failed."[69]

By the time the Board adopted its no-development policy for the Middle Run, one-third of the area had already been rezoned to higher density. This number increased to 41% by the time Williams was denied, and an additional 64-acre tract was rezoned shortly after the Williams denial and prior to the Williams trial.

As reflected by the respective opinions, in the process of reviewing both *Allman* and *Williams* the court below clearly accorded the Board its presumption of legislative validity, scrutinized the property owners' evidence of unreasonableness and the Board's offerings in support of its denials, and concluded that the reasonableness of the denial was not fairly debatable. The analytical process was accomplished within the context of well-settled principles of zoning law, and the outcome turned on the particular facts and circumstances in each case.

The court's affirmances and the facts and circumstances upon which they rest are both directly tied into the Fairfax County land use scene, a scenario of events and personalities atypical of Virginia, much less other states or the country as a whole.

Land use regulation in Fairfax County has been a function of Board complexion.[70] The present Board as-

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[69] 216 S.E.2d at 40.

[70] *Allman* App., Vol. II at 141.

sumed office in January 1972, adopted a "no-growth" policy, and immediately took steps to down-zone the Clinch property by alleging "mistake" on the part of the preceding Board despite a favorable recommendation from both its professional planning staff and planning commission. As reflected in the *Williams* record, this Board then proceeded arbitrarily to refuse public hearings to Williams and a number of other rezoning applicants while granting preferential treatment and hearings to others, a practice struck down by the trial court in the *Williams* case. In his Court-ordered hearing, Williams' request for rezoning in accord with land use plan density was denied in a summary fashion after nearly 28 months waiting to be heard. The Williams application has now been pending for nearly five years, Allman for four.

Since this Board took office, its accumulated actions have led to numerous Virginia Supreme Court decisions invalidating as arbitrary and capricious several of its land use actions.[71] These decisions represent ap-

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[71] *Board of Supervisors of Fairfax County* v. *Medical Structures, Inc.*, 213 Va. 355, 192 S.E.2d 799 (1972) (vesting of rights —refusal to process site plan);

Board of Supervisors of Fairfax County v. *City Service Oil Co.*, 213 Va. 359, 193 S.E.2d 1 (1972) (companion case to *Medical Structures*);

Board of Supervisors of Fairfax County v. *DeGroff Enterprises, Inc.*, 214 Va. 235, 198 S.E.2d 600 (1973) (ordinance requiring 15% low and moderate income housing held arbitrary, capricious, confiscatory, and without authority);

Board of Supervisors of Fairfax County v. *Lukinson*, 214 Va. 239, 198 S.E.2d 603 (1973) (companion case to *DeGroff*);

Board of Supervisors of Fairfax County v. *Snell*, 214 Va. 655, 202 S.E.2d 889 (1974) (down-zoning from comprehensively planned density invalidated—arbitrary and capricious);

Board of Supervisors of Fairfax County v. *Horne, supra*, (Interim Development Ordinance invalidated—lack of authority).

proximately 50 to 60% of the Virginia Supreme Court's total number of land use decisions during the Board's tenure, and they reflect repeated rejection, by a state court of last resort, of the persistent attempts by a local jurisdiction to expand its police power beyond the scope of delegated authority. *Allman* and *Williams* are merely a continuation of this state court/local government interplay in which the Board's actions have been invalidated on state constitutional and statutory grounds upon records overwhelmingly demonstrating inconsistent and discriminatory behavior.

D. Application of Fourteenth Amendment Standards to the Particular Facts of the *Allman* and *Williams* Cases Presents No Issue Worthy of Supreme Court Review

Clearly there is not the least suggestion of federal constitutional grounds in the *Allman* and *Williams* decisions. If one assumed, however, that the decisions below did involve either equal protection or due process standards under the Fourteenth Amendment, there would be no occasion for this Court to review the Virginia court's findings of discrimination or to see whether those findings show an equal protection or due process violation.

The relevant equal protection and due process standards are easily stated. Equal protection requires that the classification "must be reasonable, not arbitrary, and must rest upon some ground or difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920). Due process, "as has often been held, demands only that the law

shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object to be attained." *Nebbia* v. *New York, supra,* 291 U.S. at 525.

Courts called upon to decide the constitutionality of zoning actions as they impinge upon private property rights inevitably are being asked to balance, on the facts of the particular case, the private and public interests at stake—the purpose of the regulation, its economic impact upon a property owner, the fairness of classification, etc. Rezoning applications in particular require ad hoc decisions, no two of which are just alike.

Both equal protection and due process are ultimately concerned that arbitrary or invidious distinctions are not made among those who, in light of a zoning ordinance's legitimate purposes, ought not to be treated differently. Applying that test to the *Allman* and *Williams* cases, it is obvious there are findings sufficient to support a denial of equal protection or due process. But the important point, for the purposes of certiorari, is that it would be an unfortunate use of this Court's limited time to sift the facts of a particular rezoning case to see whether a state court drew permissible inferences of discrimination or arbitrariness which would support a conclusion that equal protection or due process was denied. Neither of the instant cases raises any question of general application about zoning power. Compare *Euclid* v. *Ambler Realty Co., supra.* Instead they turn on the facts of two sets of rezoning petitions—facts that have been weighed and canvassed and upon which findings have been entered by two courts, trial and appellate. These are not cases worthy of certiorari.

CONCLUSION

In essence this case is an effort to read into a state court opinion a federal ground which is simply not there. It is an attempt to have this Court displace a state court's application of state constitutional and statutory standards to a locality's exercise of powers delegated to it by state law. It is an attempt to have this Court undertake to review factual findings turning on the circumstances of a particular Virginia county. How one state chooses, under its constitution and statutes, to measure the police powers of its own political subdivisions is clearly inappropriate for Supreme Court review.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

APPENDIX

CONSTITUTION OF VIRGINIA

Article I.

BILL OF RIGHTS.

A DECLARATION OF RIGHTS made by the good people of Virginia in the exercise of their sovereign powers, which rights do pertain to them and their posterity, as the basis and foundation of government.

§ 1. Equality and rights of men.—That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

§ 8. Criminal prosecutions.—That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, and to call for evidence in his favor, and he shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty. He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers, nor be compelled in any criminal proceeding to give evidence against himself, nor be put twice in jeopardy for the same offense.

Laws may be enacted providing for the trial of offenses not felonious by a court not of record without a jury, preserving the right of the accused to an appeal to and a trial by jury in some court of record having original criminal jurisdiction. Laws may also provide for juries consisting of less than twelve, but not less than five, for the trial of offenses not felonious, and may classify such cases, and prescribe the number of jurors for each class.

In criminal cases, the accused may plead guilty. If the accused plead not guilty, he may, with his consent and the concurrence of the Commonwealth's Attorney and of the court entered of record, be tried by a smaller number of jurors, or waive a jury. In case of such waiver or plea of guilty, the court shall try the case.

The provisions of this section shall be self-executing.

§ 11. Due process of law; obligation of contracts; taking of private property; prohibited discrimination; jury trial in civil cases.—That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.

Virginia Code, Title 15.1*

§ 15.1-486. Zoning ordinances generally; jurisdiction of counties and municipalities respectively.—The governing body of any county or municipality may, by ordinance,

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* Code sections are here reproduced as they appeared at the time of both trial court and Supreme Court of Virginia decisions in *Allman* and *Williams*. Sections 15.1-486 and 15.1-489 have since been amended, effective July 1, 1975, in a manner not pertinent to the subject decisions.

divide the territory under its jurisdiction or any substantial portion thereof into districts of such number, shape and area as it may deem best suited to carry out the purposes of this article, and in each district it may regulate, restrict, permit, prohibit, and determine the following:

(a) The use of land, buildings, structures and other premises for agricultural, commercial, industrial, residential, flood plane and other specific uses;

(b) The size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures;

(c) The areas and dimensions of land, water, and air space to be occupied by buildings, structures and uses, and of courts, yards, and other open spaces to be left unoccupied by uses and structures, including variations in the sizes of lots based on whether a public or community water supply or sewer system is available and used;

(d) The excavation or mining of soil or other natural resources; and

(e) Sedimentation and soil erosion from nonagricultural lands.

For the purpose of zoning, the governing body of a county shall have jurisdiction over all the unincorporated territory in the county, and the governing body of a municipality shall have jurisdiction over the incorporated area of the municipality.

§ 15.1-488. Regulations to be uniform.—All such regulations shall be uniform for each class or kind of buildings and uses throughout each district, but the regulations in one district may differ from those in other districts.

§ 15.1-489. Purpose of zoning ordinances.—Zoning ordinances shall be for the general purpose of promoting the health, safety or general welfare of the public and of

further accomplishing the objectives of § 15.1-427. To these ends, such ordinances shall be designed (1) to provide for adequate light, air, convenience of access, and safety from fire, flood and other dangers; (2) to reduce or prevent congestion in the public streets; (3) to facilitate the creation of a convenient, attractive and harmonious community; (4) to expedite the provision of adequate police and fire protection, disaster evacuation, civil defense, transportation, water, sewerage, flood protection, schools, parks, forests, playgrounds, recreational facilities, airports and other public requirements; (5) to protect against destruction of or encroachment upon historic areas; (6) to protect against one or more of the following: overcrowding of land, undue density of population in relation to the community facilities existing or available, obstruction of light and air, danger and congestion in travel and transportation, or loss of life, health, or property from fire, flood, panic or other dangers; and (7) to encourage economic development activities that provide desirable employment and enlarge the tax base.

§ 15.1-510. General powers of counties.—Any county may adopt such measures as it may deem expedient to secure and promote the health, safety and general welfare of the inhabitants of such county, not inconsistent with the general laws of this State. Such power shall include, but shall not be limited to, the adoption of quarantine regulations affecting both persons and animals, the adoption of necessary regulations to prevent the spread of contagious diseases among persons or animals and the adoption of regulations for the prevention of the pollution of water in the county whereby it is rendered dangerous to the health or lives of persons residing in the county.

REPLY

BRIEF

FILED
OCT 29 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-388

THE BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, *Petitioner,*

v.

ROY G. ALLMAN, Trustee, ET AL., *Respondent.*

THE BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, *Petitioner,*

v.

THOMAS R. WILLIAMS, ET AL., *Respondent.*

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THOMAS R. WILLIAMS, ET AL., *Respondent.*

REPLY BRIEF OF PETITIONERS

ARGUMENT

I. The Supreme Court of Virginia Relied on the Fourteenth Amendment to the United States Constitution.

Respondents contend:

> Nowhere is there a reference to or reliance upon the findings of a federal case.[57] Nowhere in the *Allman* or *Williams* holdings is there a reliance upon either the principles derived from or language found in the Federal Constitution, federal statutes, or federal case law. Brief in Opposition, p. 34.

It is interesting to note that Respondents' footnote 57 admits a citation to *Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926). The Board has already shown a clear reliance on the case law of this Court.[1]

[1] *See* Petition For Writ of Certiorari, p. 15, note 2.

A. Equal Protection

The Board has also traced and clearly shown a reliance on Equal Protection.[2] This reliance was specifically acknowledged by Justice Cochran, who concurred in *Allman,* in his dissent in *Williams* and by Justice Poff, a member of the majority in both *Allman* and *Williams,* in his opinion in *Board of Supervisors of James City County* v. *Rowe,*[3] another land use case decided the same day as *Williams* and the same day rehearing was denied in *Allman.* Interestingly, Respondents have not seen fit to address *Rowe* in their Brief in Opposition.

As noted[4] the *Virginia Constitution* does have a discrimination clause but does not have a equal protection clause. The discussion of the discrimination clause in *The Constitution of Virginia: Report of the Commission on Constitutional Revision,* cited by Respondents, should be decisive.

> *Anti-discrimination clause.* The antidiscrimination clause which the Commission proposes adding at the end of section 11 would perform functions analogous to those of the federal equal protection clause, except that the language proposed for section 11 is more tightly drafted than the federal provision and therefore is less open-ended in its possibilities of application than is the federal language. *Id.,* at p. 96. *See also,* Howard, *Commentaries on the Constitution of Virginia,* (1974), p. 234.

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[2] *Id.,* pp. 11-15.

[3] 216 S.E.2d 199 (Va. 1975) reprinted in *Appendix* of Petition For Writ of Certiorari.

[4] Petition For Writ of Certiorari, p. 14, note 9.

The pertinent part of section 11[5] reads as follows:

> . . . that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex or national origin shall not be abridged . . . .

Clearly, then, the references to the "constitutional right to equal protection" and "equal protection guarantee" are far beyond the "tightly drafted" Virginia constitutional provision on discrimination and find their basis in the Fourteenth Amendment to the United States Constitution.[6]

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[5] This provision is printed in its entirety in the Petition For Writ of Certiorari at Footnote 9.

[6] Respondents contend at page 32 of the Brief in Opposition that the Board has previously stated that the Equal Protection Clause of the Fourteenth Amendment has been codified in Virginia in *Va. Code Ann.* § 15.1-488. Taken in context the referenced statement is hardly so broad. Section 15.1-488 reads as follows:

> Regulations to be uniform—All such regulations shall be uniform for each class or kind of buildings and uses throughout each district, but the regulations in one district may differ from those in other districts. (*See Appendix* to Petition For Writ of Certiorari, p. 89)

This statute simply means that one RE-1 (single family residence—one acre) district as applied to one specific piece of property must have the same regulations as an RE-1 district applied to another piece of property. However, R-12.5 (single family residence—12,500 square feet) districts may have different regulations than RE-1 districts.

When read, the simplicity of this statute also makes ridiculous Respondents' apparent contention that the Supreme Court of Virginia based its decisions in *Allman, Williams* and *Rowe* on this statutory provision. Brief in Opposition, pp. 30-31. At no point did Allman or Williams contend that the regulations in their RE-1 district were any different from regulations in other RE-1 districts.

It should also be noted that *Board of Supervisors* v. *Carper*, 107 S.E.2d 390 (Va. 1959), the case which Respondents contend was the basis for the lower court's holding in *Allman* and *Williams* under *Va. Code Ann.* § 15.1-488, was written by Justice I'Anson who joined the dissent in *Williams*.

Respondents cite cases which specifically rely on the *Virginia Constitution.*[7] They admit, however, that neither *Allman* nor *Williams* does so.[8] Not a single provision of the *Virginia Constitution* was cited, or discussed in either *Williams* or *Allman.* Respondents cite no case where the Supreme Court of Virginia uses "equal protection" when referring to the State Constitution or statutes. Cases are cited in which the Supreme Court of Virginia has specifically cited the Fourteenth Amendment.[9] In three of the four cases cited, the Virginia court upheld the challenged acts against a Fourteenth Amendment challenge. In the fourth case, *Williams* v. *City of Richmond,*[10] the actions were declared unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The latter is referred to as "a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Federal Constitution" and the "equal protection provision of the Constitution." Justice Poff in *Rowe* calls it "the equal protection guarantee," and "equal protection of the laws." Justice Cochran in dissent in *Williams* calls it the "constitutional right to equal protection." [11]

It is also very damaging to Respondents' position that in *Williams* v. *City of Richmond,*[12] the Supreme

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[7] Brief in Opposition, pp. 20-22.

[8] *Id.*, p. 36.

[9] *Id.*, p. 28, note 46.

[10] 14 S.E.2d 287, 292 (Va. 1941).

[11] *See* Petition for Writ of Certiorari, pp. 12-13.

[12] *See* note 10, *supra.*

Court of Virginia in discussing the Fourteenth Amendment Equal Protection states:

> A classification will not be sustained however, where it is arbitrary or capricious, and rests on no substantial or reasonable basis. In *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U.S. 232, 233, 10 S.Ct. 533, 535, 33 L.Ed. 892, it is said: "But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. *Id.*, 14 S.E.2d at 292.

"Discrimination," "arbitrary," "capricious" and "reasonable" are the very words which Respondents maintain dictate a reliance on state law.[13] However, here they are used by the Supreme Court of Virginia when discussing Fourteenth Amendment Equal Protection. When combined with the use of "equal protection" by Justices Cochran and Poff and the absence of the use of "equal protection" when referring to state law in the case law of Virginia, it becomes clear that the *Allman-Williams-Rowe* trilogy rely on the Fourteenth Amendment as does *Williams* v. *City of Richmond, supra.*[14]

B. Due Process

In arguing that *Allman* and *Williams* were based on State law, Respondents cite *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) and *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963),

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[13] Brief in Opposition, pp. 12, 24, 26-7.

[14] *Compare Township of Mount Laurel* v. *Southern Burlington County NAACP*, 336 A.2d 713 (N.J. 1975); *Appeal dismissed, cert. denied* 44 U.S.L.W. 3181 (U.S. Oct. 6, 1975) in which the Supreme Court of New Jersey specifically relied on state constitutional provisions.

for the proposition that this Court has taken a "hands off" attitude to the state exercise of the police power in the economic area.[15] Their reliance is misplaced.

It is noteworthy that in Section III of the Brief in Opposition, where Respondents argue for denial even assuming state court reliance on the Fourteenth Amendment, *Lincoln Federal* and *Ferguson* are conspicuous by their absence. The fundamental point in both cases is that in each this Court sustained a state legislative exercise of the police power in the economic sphere and refused to authorize judicial interference.

In the cases involved in this Petition a state legislative exercise of the police power has been overruled by judicial reliance on substantive due process. In *Lincoln Federal* and *Ferguson,* the exercise of state legislative power was protected and judicial reliance on discredited notions of substantive due process was expressly disavowed by this Court. Respondents' Brief in Opposition is corroborative of the need for a grant of certiorari in this matter. The constitutional issue is clear. Respondents contend that even assuming the presence of federal grounds, *Williams* and *Allman* are correctly decided. *See* Brief in Opposition, p. 36. This can only mean that state courts may use the Fourteenth Amendment to displace the legislative judgment even though federal courts may not.

It has been understood for a generation that the judicial abdication, at least on Federal Constitutional grounds, is to be the norm in areas such as zoning where substantive economic rights are at stake. As far back as 1962, Professor McCloskey, reviewing the trend of

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[15] Brief in Opposition, p. 18.

substantive due process cases in this Court, reached the following conclusion:

> [N]o claim of substantive economic rights would now be sustained by the Supreme Court. The judiciary has abdicated the field.[16]

The death certificate, if one was needed, for substantive due process can be found in *North Dakota State Pharmacy Board* v. *Snyder's Drug Store*, 414 U.S. 156 (1973), explicitly overruling *Louis K. Liggett Company* v. *Baldridge*, 278 U.S. 105 (1928), as being in "that vintage of decisions which exalted substantive due process by striking down state legislation which a majority of the Court deemed unwise." 414 U.S. at 164. *Snyder* adopts the Holmes-Brandeis view eschewing the use of the due process clause to subordinate legislative judgment to the judicial enhancement of private economic rights. Mr. Justice Douglas quoted in *Snyder* from *Lincoln Federal, supra*, in order to illustrate the demise of substantive due process in Fourteenth Amendment litigation:

> "This Court beginning at least as early as 1934, when the *Nebbia* case was decided, has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of *some valid* federal law. . . . *Under this constitutional doctrine the due process clause is no longer to be so broadly construed that the Con-*

[16] McCloskey, *Economic Due Process in the Supreme Court: An Exhumation and Reburial*, 1962 Supreme Court Review 34, 38.

> *gress and state legislatures are put in a straitjacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare." 335 U.S., at 536-537.* 414 U.S. at 164-5. (Emphasis added)

In other words, this Court in *Snyder* took pains to endorse the view that the due process clause of the Fourteenth Amendment cannot be used to put state legislative power "in a straitjacket." *Snyder* makes it unmistakably clear that substantive due process as Fourteenth Amendment doctrine is dead in the state supreme courts. In this connection, it should be remembered that *Snyder* came to this Court from a state supreme court under the very same jurisdictional provision, 28 U.S.C. 1257 (3), which is the basis for jurisdiction in this case.

The issue in this case is not whether pursuant to a specific reliance on the state constitution, a state may continue to follow the doctrine of substantive due process, itself an issue not free from doubt.[17] The issue is whether or not a state court relying on the Federal Constitution may ignore Supreme Court precedents with respect to substantive due process. On this latter point, the Brief in Opposition is entirely unre-

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[17] *See* Howard, *Commentaries on the Constitution of Virginia, supra*, p. 195; "The rise and fall of substantive due process in Virginia closely parallel the corresponding evolution of judicial economic regulation in the federal courts." We note that Respondent relies on *Moore* v. *Sutton*, 39 S.E.2d 348 (Va., 1946), for the continuing vitality of substantive due process as a matter of state constitutional law. *Moore* v. *Sutton* is characterized by Professor Howard "as the last gasp of economic substantive due process in Virginia." Howard, *supra*, p. 199. *Cf.* also Sandalow, *Henry* v. *Mississippi and the Adequate State Ground, Proposals for a Revised Doctrine*, 1965 Sup. Ct. Rev. 187, 201-202, quoted in the Petition for Writ of Certiorari, p. 50.

sponsive. Thus, we note that Respondent cites *Boomer* v. *Olsen*, 143 Neb. 579, 10 N.W.2d 507 (1943) on page 17 in its Brief in Opposition. In *Boomer*, the Supreme Court of Nebraska struck down the same statute under the Nebraska Constitution which this Court had held valid under the Fourteenth Amendment. *Boomer* is precedent for Petitioner, not Respondents. Unlike *Williams* and *Allman*, the *Boomer* case was an explicit, exclusive, and unmistakable example of reliance on state constitutional provisions. In *Williams* and *Allman*, no such explicit reliance, exclusive or otherwise, on state constitutional provisions can be found.

Respondent contends that this Petition is an attempt to produce a federal constitutional issue when none exists. It would be far more accurate to say, however, that Respondent is insisting on exhuming a doctrine in federal constitutional law which no longer exists, i.e., substantive due process.

This Petition for Certiorari is sought, in part, because the Virginia judiciary has refused to abdicate the field of substantive economic regulation in the areas of zoning and planning. It is Petitioner's contention that where judicial intrusion into the planning process is based on the Fourteenth Amendment, the Fourteenth Amendment is violated when judicial judgment is substituted for legislative judgment.

II. The Principles Enunciated in Allman and Williams Have the Potential for Far More than Local Effect.

A. The Effect Has Already Reached Beyond Fairfax County in Virginia.

Respondents contend that *Allman* and *Williams* have no precedential value because the cases involved isolated factual patterns in Fairfax County and involved

the actions of a particular Board of Supervisors.[18] This representation of Respondents has already been proved incorrect. The actions of two other Virginia jurisdictions in land use have been reversed on the basis of *Allman* and *Williams* citing the "discriminatory and, therfore, arbitrary and capricious" language.[19]

B. The Effects May Be National.

Respondents submit that there is little, if any, interplay between the land use and statutory construction decisions of the state courts.[20] *Board of Supervisors* v. *Carper*,[21] the case most often cited by Respondents, contradicts the former contention since it has been used as precedent in Ohio, Maryland, Massachusetts, and New Jersey.[22]

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[18] Brief in Opposition, pp. 39-44. It should be noted that the subject Board of Supervisors took office in January, 1972. Allman's rezoning was denied in October, 1971, by the previous Board. *Allman*, Appendix I, p. 4.

[19] Arlington County, Virginia—*County Board of Arlington County* v. *God*, slip op. Sept. 5, 1975; City of Fairfax, Virginia—*City Council of the City of Fairfax, Virginia* v. *Swart*, slip op., Sept. 5, 1975. Both cases are reprinted in the Appendix to this Brief.

[20] Brief in Opposition, p. 38.

[21] 107 S.E.2d 390 (Va. 1959).

[22] *County Commissioners of Queen Anne's County* v. *Miles*, 228 A.2d 450, 457 (Md., 1967); *The State ex rel. Grant Ex'r.* v. *Kiefaber* 181 N.E.2d 905, 914 (Ohio, 1960); *Brd. of Appeals of Hanover* v. *Housing Appeals Com.*, 294 N.E.2d 393, 423 (Mass., 1973); and *Oakwood* at *Madison* v. *Township of Madison*, 283 A.2d 353, 357 (N.J., 1971). Respondents also apparently disagree with their own contention, citing cases from the state courts of Pennsylvania, Florida, Alabama, Illinois, Michigan, Kansas, New Jersey, Maryland and Massachusetts in their Briefs of Appellees to the Su-

As to the latter contention—that statutory construction decisions of one state do not influence other states —the Supreme Court of Virginia has clearly shown its falsity. In *Ross* v. *County Board of Arlington County,*[23] the Virginia court used a New York case to help construe wording in the land use section of the Virginia Code.

> The wording of the Virginia and New York statutes is for all practical purposes identical. Both were evidently taken from the model "Standard State Zoning Enabling Act," which contains the provision. . . .

The Board has already shown that the zoning decisions judicially reversed in *Allman* and *Williams* were based upon the provisions of that very standard zoning act, various forms of which have been adopted by 47 states including Virginia.[24] The quotation from the Supreme Court of Virginia in *Ross* destroys Respondents argument and demonstrates the potential national impact of *Allman* and *Williams.*

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preme Court of Virginia in *Allman* and *Williams.* Respondents submitted the case law of these states as authority for their position before the Supreme Court of Virginia. It is inconsistent to argue that *Allman* and *Williams* will not likewise be used as precedent in other states.

[23] 87 S.E.2d 794, 795 (Va. 1955).

[24] Petition for Writ of Certiorari, pp. 56-60.

CONCLUSION

For the reasons set forth herein, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Present: All the Justices.

COUNTY BOARD OF ARLINGTON COUNTY

v.

MARY ROSE GREEN GOD

Record No. 740803

PER CURIAM

Richmond, Virginia, September 5, 1975

From the Circuit Court of Arlington County

PAUL D. BROWN, *Judge*

This is a zoning case in which the County Board of Arlington County denied the application of the landowner, Mary Rose Greene God, for rezoning from single-family residential district (R-6) to apartment house district (RA6-15) of two adjoining lots in the northern portion of the County. Upon the landowner's motion for declaratory judgment, the trial court found that the existing zoning was unreasonable, and therefore invalid, and that the denial of the rezoning was arbitrary and capricious. In its final order, the court placed the land in the zoning classification sought by the landowner.

While the appeal awarded in this case brings under review the trial court's holding that the rezoning denial was arbitrary and capricious, the principal reason we awarded the appeal was to examine the court's action in actually rezoning the land. In light of our recent decisions in the *Randall, Allman*, and *Williams* cases,[1] all handed

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[1] *City of Richmond* v. *Randall*, 215 Va. 506, 211 S.E.2d 56 (1975), *Board of Supervisors of Fairfax County* v. *Allman*, 215 Va. 434, 211 S.E.2d 48 (1975), and *Board of Supervisors of Fairfax County* v. *Williams*, — Va. —, S.E.2d — (1975).

down after the date of final judgment in the present case, we are constrained to affirm, in summary fashion, the trial court's finding of arbitrariness and capriciousness and to reverse, in similar fashion, the court's action in rezoning the land.

First, with respect to the holding that the rezoning denial was arbitrary and capricious, the evidence fully sustains the trial court's conclusion. The two lots in question, together with two other lots in different ownership, are the remnants of a larger single-family residential district established in 1950 in a block now almost entirely zoned for and devoted to apartment uses, in an area of Arlington County dominated by garden-type apartment houses. The landowner showed that the construction of single-family residences on the lots in question would be economically unfeasible; that the existing zoning was unreasonable; and that her proposed use, the construction of 10 "townhouses of garden apartment style" under an appropriate zoning classification, would be reasonable. Against this, only the opposition of a local civic association and the claim of a serious water problem, which proved to be non-existent, suggested that the present zoning should be retained.

The landowner's evidence was sufficient to overcome the presumed legislative validity of the Board's action and to show that the denial was unreasonable. The Board, however, in its turn, failed to produce evidence sufficient to show that the denial was reasonable. The question, then, was not fairly debatable. *See City of Richmond* v. *Randall, supra,* 215 Va. at 511, 211 S.E.2d at 60. Under the circumstances of this case, the denial of the rezoning application was discriminatory and, therefore, arbitrary and capricious. *See Board of Supervisors of Fairfax County* v. *Allman, supra,* 215 Va. at 445, 211 S.E.2d at 55.

With respect to the trial court's action in actually rezoning the lots in question, the landowner, in light of *Allman,*

concedes that the court "did not have the right . . . to simply rezone the land." The landowner also concedes that under the evidence before the trial court there are, in addition to the RA6-15 apartment classification she sought, other multiple-unit zoning categories which would permit her proposed use. The landowner agrees, therefore, that the case must be remanded for further consideration by the Board, at the direction of the trial court, of an appropriate multiple-unit zoning classification for her property.

Accordingly, we affirm the trial court's findings that the existing single-family zoning of the lots in question is invalid and that the Board's denial of rezoning was arbitrary and capricious. We reverse the action of the court in actually rezoning the land. The case will be remanded to the trial court with instructions to enter another order. The new order will suspend the adjudication of invalidity for a prescribed period of time and direct the Board to consider further legislative action. Because the evidence shows that the apartment-house use proposed by the landowner is reasonable,[2] the new order will enjoin the Board during the prescribed period from taking any action which would disallow such use. The new order will further provide that should the Board fail to take appropriate action within the prescribed period, the adjudication of invalidity will become operative and the injunction will become permanent, provided that the landowner shall not put her property to any uses other than those shown by the record to be reasonable.

Affirmed in part, reversed in part, and remanded.

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[2] In light of the landowner's concession that other multiple-unit zoning categories would permit her proposed use, the Board, following remand, will be free to consider such other categories in addition to the RA6-15 zoning sought by the landowner.

Present: Carrico, Harrison, Cochran, Harman, Poff and Compton, J.J.

PER CURIAM

Record No. 740584

CITY COUNCIL OF THE CITY OF FAIRFAX, VIRGINIA

v.

JOHN F. SWART, JR., ASA A. SWART and THE HECHINGER COMPANY

Richmond, Virginia, September 5, 1975

From the Circuit Court of Fairfax County

PERCY THORNTON, JR., *Judge*

The City Council (Council) of the City of Fairfax (City) denied the application of the landowners, John F. Swart, Jr., and Asa A. Swart, and their lessee, The Hechinger Company, (collectively referred to as Swart) to rezone 3.285 acres of land on Jermantown Road in the City of Fairfax from single-family residential use (R-3) to commercial use (C-2). Upon Swart's motion for declaratory judgment, the trial court found the Council's action in refusing to rezone the subject property to be unreasonable, arbitrary and capricious, and, therefore, null and void. The court, in its final order, permitted Swart to develop the land "in accordance with the . . . ordinances of the [City] relating to development in the C-2 zoning classification . . ."

As in *County Board of Arlington County* v. *God*, 216 Va. — S.E.2d — (Record No. 740803, this day decided), our principal reason for awarding this appeal was to examine the court's action in actually rezoning the land. While the City claims error in the court's finding of arbitrariness and capriciousness and in refusing to admit the evidence of one witness proffered by the City, we affirm those rulings.

With respect to the holding that the denial of rezoning

was arbitrary and capricious, the evidence fully sustains the trial court's conclusion. For a number of years John F. Swart, Jr., and Asa F. Swart have owned a 5.652 acre tract in the northwest quadrant of the intersection of Jermantown Road and Lee-Jackson Highway (Route 50) in the City. The southern 2.367 acres of the tract, which fronts on both Route 50 and Jermantown Road, is zoned commercial, as is all of the frontage on Route 50 in the City from its intersection with Routes 29-211 at Kamp Washington, approximately one-half mile southeast of the Swart tract.

The Western boundary line of the Swart tract is also the boundary line between the City and the County of Fairfax The land abutting the Swart tract on the west is comprehensively planned by Fairfax County for high density residential use, a classification permitting up to 20 dwelling units per acre. The land across Jermantown Road, to the east of the Swart tract, is zoned commercial. The evidence showed that a bank and a convenience store were already in operation there and that a six story motel was under construction. All of the road frontage on Jermantown Road for more than one-half mile south of the Swart tract was zoned either commercial or industrial.

While the property adjoining the Swart property on the north, fronting 200 feet on the west side of Jermantown Road, is still zoned residential (R-3), the adjoining tract to the north was rezoned commercial (C-2) by the Council in 1969. To the north of and adjoining this C-2 tract is a high density, multi-family housing development.

North of the Swart tract, the City owns a parcel of land fronting approximately 1500 feet on the east side of Jermantown Road, adjoining the motel site. An intermediate school, with access to both Bevan Drive, a residential street, and Jermantown Road, occupies the northern portion of this parcel.

When a comprehensive land plan for the area was last adopted by the City in 1968, this plan designated all of the frontage on Jermantown Road south of the existing multi-family housing development as an area for commercial development.

Swart's expert evidence established that the construction of single-family residences on the tract in issue was economically unfeasible; that the existing zoning was unreasonable; and that the proposed commercial use, a large hardware department store, is a reasonable use of the property and compatible with the area.

While the City presented evidence that the tract in question "could" or "might" be developed under its existing R-3 zoning, this evidence was so insubstantial, vague and speculative as to be unconvincing to the trial court, as it is to use.

Here the landowner's evidence was sufficient to overcome the presumed legislative validity of the Council's action and to show that the denial was unreasonable. Thereafter, the City failed to produce evidence sufficient to show that the denial was reasonable. The question, then, is not fairly debatable. *See City of Richmond* v. *Randall*, 215 Va. 506, 511, 211 S.E.2d 56, 60 (1975). Under the circumstances of this case, the denial of the rezoning application was discriminatory and, therefore, arbitrary and capricious. *See Board of Supervisors of Fairfax County* v. *Allman*, 215 Va. 434, 445, 211 S.E.2d 48, 55 (1975).

We find no error in the trial court's refusal to qualify Edward Trexel, a member of the City Planning Commission, as an expert witness. The qualification of an expert witness is a matter largely within the discretion of the trial court and its ruling will not be disturbed in the absence of the showing of an abuse of such discretion. *See Ames & Webb, Inc.* v. *Commercial Laundry*, 204 Va. 616, 621, 133 S.E.2d 547, 550 (1963).

The final question presented concerns the trial court's rezoning of the land. This case was decided by the Chancellor before our recent decisions in *City of Richmond* v. *Randall, supra, Board of Supervisors of Fairfax County* v. *Allman, supra,* and *Board of Supervisors of Fairfax County* v. *Williams,* 216 Va. —, S.E.2d — (1975). Since the rezoning violates the legal principles set forth in those cases, we summarily reverse that part of the final order of the trial court.

Accordingly, we affirm the trial court's finding that the existing R-3 zoning of the land in question is invalid and that the Council's denial of rezoning was arbitrary and capricious. We, likewise, affirm the trial court's ruling in refusing to qualify Trexel as an expert. We reverse the action of the court, however, in actually rezoning the land and the case will be remanded with instructions to enter another decree. The new decree will suspend the adjudication of invalidity for a prescribed period of time and remand the matter to the Council for further legislative action. Since the City has made no showing of an alternate reasonable use, the new decree will enjoin Council, during the prescribed period, from taking any action which would disallow the one use shown by the record to be reasonable. The decree of the trial court will further provide that should the Council fail to comply within the time prescribed, the adjudication of invalidity of zoning classification R-3 for the property will become operative and the injunction will become permanent, provided that Swart shall not put the property to any use other than the use shown by the record to be reasonable.

Affirmed in part; reversed in part; and remanded.